Petition

No. 81 6323

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES.

PETITIONER.

VS.

STATE OF ILLINOIS.

RESPONDENT.

ON APPEAL FROM THE ILLINOIS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Mr. Dickie Gaines. #C-71796
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Lock Box 711
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Appearing Pro Se.

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NATURE OF THE ACTION

Petitioner was convicted of murder, armed violence, armed robbery, and attempt murder after a jury trial, in the Circuit Court of Cook County, Illinois on October 10, 1979. The State requested a sentencing hearing to determine whether the death penalty should be imposed. After the proceeding the jury imposed the death penalty. Petitioner was sentenced to death by the trial Court on November 2, 1979. An automatic appeal was taken to the Illinois Supreme Court. The Illinois Supreme Court affirmed petitioner's conviction and sentence on December 4, 1981. Petitioner file for rehearing of the case on January 15, 1982. The petition for rehearing was denied on January 29, 1982. The Illinois Supreme Court, "on it's own motion" stayed the mandate of petitioner's execution, pending the timely filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States.

QUESTIONS PRESENTED FOR REVIEW

I... DID ILLEGAL EAVESDROPPING OCCUR, WHERE LAW ENFORCEMENT OFFICER LISTENED TO A TELEPHONE CONVERSATION BETWEEN PETITIONER AND CO-DEFENDANT, WITHOUT JULICIAL APPROVAL OR WITHOUT CONSENT OF EITHER PARTY, WAS THIS A VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS???

II... WAS PETITIONER'S SIXTH AMENDMENT RIGHTS VIOLATED WHERE TRIAL COURT PERMITTED HEARSAY EVIDENCE AT TRIAL WHICH PREJUDICED THE PETITIONER, AND DENIED HIM HIS RIGHT OF CONFRONTATION AS GUARANTEED BY THE UNITED STATES CONSTITUTION SIXTH AMENDMENT?????

JURISDICTION ON WRIT OF CERTIORARI

On December 4, 1981, the Illinois Supreme Court affirmed petitioner's conviction and sentence, (See copy of opinion attached to appendix). On January 15, 1982 petitioner filed for rehearing of the case. Petition for rehearing was denied on January 29, 1982, (See Court order denying petition for rehearing attached to appendix). On February 2, 1982 the Illinois Supreme Court, "on it's own motion" stayed the mandate of execution pending the timely filing and disposition for writ of certiorari to the U.S. Supreme Court, (See order attached to appendix)..

The jurisdiction of this Court is invoked pursuant to title 28 United States Code, Section 1254 (1). Also jurisdiction is invoked pursuant to U.S. Supreme Court Rule 17.

1. (B)

When a State Court of last resort has decided a Federal question in a way in conflict with the decision of another State Court of last resort or of a Federal Court of Appeals.

(C)

When a State Court or a Federal Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court, or has decided a Federal question in a way in conflict with applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT VI

In criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

UNITED STATES CONSTITUTION, AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

OTHER CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVED.

ILLINOIS CONSTITUTION OF 1970

ARTICLE ONE SECTION 6

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means, no warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

ILLINOIS CONSTITUTION OF 1970

ARTICLE ONE SECTION 8

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to meet the witnesses face to face process to compel the attendance of the witnesses in his behalf; and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

ILLINOIS CONSTITUTION OF 1970

ARTICLE ONE SECTION 2

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

ILLINOIS CONSTITUTION OF 1970

ARTICLE ONE SECTION 12

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

CHAPTER 38 ILLINOIS CRIMINAL LAW AND PROCEDURE § 14-1 (ILL. REV. STAT. 1979)

§ 14-1 DEFINITION (A) EAVESDROPPING DEVICE.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however that this definition shall not include devices used for the restoration of the deaf or hard of hearing to normal or partial hearing

(B) EAVESDROPPER.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this article.

(C) PRINCIPAL.

A principal is any perso who:

(1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or

(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or

(3) Directs another to use an eavesdropping device illegally on his behalf.

CHAPTER 38 ILLINOIS CRIMINAL LAW AND PROCEDURE § 14-2 (ILL. REV. STAT. 1979)

§ 14-2 ELEMENTS OF THE OFFENSE. A PERSON COMMITS EAVESDROPPING WHEN HE:

(A) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party to such conversation and in accordance with ARTICLE 108 A of the "CODE OF CRIMINAL PROCEDURE of 1963" approved August 14, 1963, as amended OR

(B) Uses or divulges, except as authorized by ARTICLE 108 A of the "CODE of CRIMINAL PROCEDURE of 1963, approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

CHAPTER 38 ILLINOIS CRIMINAL LAW AND PROCEDURE § 14-5 (ILL. REV. STAT. 1979)

§ 14-5 EVIDENCE INADMISSIBLE

Any evidence obtained in violation of this article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this article.

CHAPTER 38 CRIMINAL LAW AND PROCEDURE § 108 A -1 (ILL. REV. STAT. 1979)

§ 108 A -1 Authorization for use of eavesdropping device. The State's Attorney may authorized an application to a Circuit Judge for, and such Judge may grant in conformity with this article, an order authorizing or approving the use of an eavesdropping device by a law enforcement officer or agency having responsibility for the investigation of any felony under Illinois law where any one party to a conversation to be monitored, or previously monitored in the case of an emergency situation as defined in this article, has consented to such monitoring.

CHAPTER 38 CRIMINAL LAW AND PROCEDURE § 108 A -3 (ILL. REV. STAT. 1979)

§ 108 A -3 Procedure for obtaining Judicial approval of use of eavesdropping device.

(A) Where any one party to a conversation to occur in the future has consented to the use of an eavesdropping device to overhear or record the conversation a Judge may grant approval to an application to use an eavesdropping device pursuant to the provisions of this section.

Each application for an order authorizing or subsequently approving the use of an eavesdropping device shall be made in writing upon oath or affirmation to a Circuit Judge and shall state the applicant's authority to make such application. Each application shall include the following:

(1) The identity of the investigative or law enforcement officer making the application and the State's Attorney authorizing the application;

(2) A statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issues including; (a) details as to the felony that has been, is being, or is about to be committed; (b) a description of the ~~device~~ type of communication sought to be monitored; (c) the identity of the party to the expected conversation consenting to the use of an eavesdropping device. (d) the identity of the person, if known whose conversations are to be overheard by the eavesdropping device;

(3) A statement of the period of time for which the use of the device is to be maintained or, if the nature of the investigation is such that the authorization for use of the device should not terminate automatically when the described type of communication is overheard or recorded, a description of facts establishing reasonable cause to believe that additional conversations of the same type will occur thereafter;

(4) A statement of the existence of all previous applications known to the individual making the application which have been made to any Judge requesting permissions to use an eavesdropping device involving the same persons in the present application, and the action taken by the Judge on the previous applications;

(5) When the application is for an extension of an order, a statement setting forth the results so far obtained from the use of the eavesdropping device or an explanation of the failure to obtain such results.

(b) The Judge may request the applicant to furnish additional testimony, witnesses, or evidence in support of the application.

CHAPTER 38 CRIMINAL LAW AND PROCEDURE § 108 A -4 (ILL. REV. STAT. 1979)

§ 108 A -4 Grounds for approval or authorization.
The Judge may authorize or approve the use of the eavesdropping device where it is found that:

(a) One party to the conversation has or will have consented to the use of the device;

(b) There is reasonable cause for believing that an individual is committing has committed, or is about to commit a felony under Illinois law;

(c) There is reasonable cause for believing that particular conversations concerning that felony offense will be obtained through such use; and

(d) For any extension authorized, that further use of a device is warranted on similar grounds.

CHAPTER 38 CRIMINAL LAW AND PROCEDURE § 108 A -5 (ILL. REV. STAT. 1979)

§ 108 A -5 Orders authorizing use of an eavesdropping device.

(a) Each order authorizing or approving the use of an eavesdropping device shall specify:

(1) The identity of the person who has consented to the use of the device to monitor any of his conversations and a requirement that any conversation overheard or received must include this person;

(2) The identity of the other person or persons, if known, who will participate in the conversation;

(3) The period of time in which the use of the device is authorized, including a statement as to whether or not the use shall automatically terminate when the described conversations have been first obtained.

(b) No order entered under this section may authorize or approve the use of any eavesdropping device for any period longer than 10 days. An initial or a subsequent extension, in no case for more than 10 days each, of an order may be granted but only upon application made in accordance with Section 108 A -3 and where the Court makes the findings required in Section 108 A -4

CHAPTER 38 CRIMINAL LAW AND PROCEDURE § 108 A -6 (ILL. REV. STAT. 1979)

§ 108 A -6 Emergency exception to procedures,

(a) Notwithstanding any other provisions of this article, any investigative or law enforcement officer, upon approval of a State's Attorney, or without it if a reasonable effort has been made to contact the appropriate State's Attorney may use an eavesdropping in an emergency situation as defined in this Section. Such use must be in accordance with the provisions of this Section and may be allowed only where the officer reasonably believes that an order permitting the use of the device would issue were there a prior hearing.

An emergency situation exists when, without previous notice to the law enforcement officer sufficient to obtain prior judicial approval, the conversation to be overheard or recorded will occur within a short period of time or the use of the device is necessary for the protection of the law enforcement officer.

(b) In all such cases, an application for an order approving the previous or continuing use of an eavesdropping device must be made within 48 hours of the commencement of such use. In the absence of such an order, or upon its denial, any continuing use shall immediately terminate.

In order to approve such emergency use, the Judge must make a determination (1) That he would have granted an order had the information been before the Court prior to the use of the device and (2) That there was an emergency situation as defined in this section.

(c) In the event that an application for approval under this section is denied the contents of the conversations overheard or recorded shall be treated as having been obtained in violation of this article.

CHAPTER 38 CRIMINAL LAW AND PROCEDURE § 108 A -9 (ILL. REV. STAT. 1979)

§ 108 A -9 Motion to suppress contents of recording, etc. (a) Any aggrieved person in any judicial or administrative proceeding may move to suppress the contents of any recorded conversation or evidence derived therefrom on the grounds that:

(1) The conversation was unlawfully overheard and recorded;

(2) The order of authorization or approval under which the device was used or a recording made was improperly granted; or

(3) The recording or interception was not made in conformity with the order of authorization.

(b) Such a motion shall be made before the proceeding unless there was no previous opportunity for such motion. If the motion is granted, the contents shall be treated as having been obtained in violation of this article. Upon the filing of such a motion, the Judge may in his discretion make available to the moving party or his attorney such portions of the recorded conversation or evidence derived therefrom as the Judge determines to be in the interests of justice.

POINTS AND AUTHORITIES

I... DID ILLEGAL EAVESDROPPING OCCUR, WHERE LAW ENFORCEMENT OFFICER LISTENED TO A TELEPHONE CONVERSATION BETWEEN PETITIONER AND CO-DEFENDANT, WITHOUT JUDICIAL APPROVAL OR WITHOUT CONSENT OF EITHER PARTY, WAS THIS A VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS????

CASES,

People vs. Kurth, 34 ILL. 2d 387, 46 N.E. 2d 154 (1966)

People vs. Perez, 92 ILL. APP. 2d 366, 235 N.E. 2d 335 (1968)

United States vs. Harpel, 493 F. 2d 346 (10th Circuit 1974)

United States vs. Savage, 564 F. 2d 728 (5th Circuit 1977)

State vs. Nova, 361 So. 2d 412 (Supreme Court of Florida) (1978)

Campiti vs. Walonis, 611 F. 2d 389 (1st Circuit 1979)

Katz vs. United States, 389 U.S. 347 (1967)

People vs. Tebo, 194 N.W. 2d 517 (Mich. APP. 1971)

Rickenbaker vs. Rickenbaker, 226 S.E. 2d 347 (Supreme Court of N. Carolina)

Kupley vs. State, 560 P. 2d 146 (Supreme Court of Nevada 1977)

Anonymous vs. Anonymous, 558 F. 2d 677 (2nd Circuit 1977)

State vs. Dwyer, 585 P. 2d 900, (Arizona. APP. 1978)

James vs. Newspaper Agency Corp, 591 F.2d 579 (10th Circuit 1979)

Briggs vs. American Air Filter Co; Inc, 455 F. Supp. 179
(U.S.D.C. N.D. Georgia 1978)

People vs. Richardson, 60 Ill. 2d 189, 328 N.E. 2d 260 (1975)

People vs. Kezerian, 77 Ill. 2d 121, 395 N.E. 2d 551 (1979)

People vs. Satek, 78 Ill. App. 3d 543, 396 N.E. 2d 1133 (1979)

People vs. Giannopoulus, 20 Ill. App 3d 338, 314 N.E. 2d 237 (1974)

People vs. West Diversey Ave; Second Floor Apt; Chicago, 96 ILL. App 2d 479, 238 N.E. 2d 229 (1968)

People vs. Brown, 131 Ill. App. 2d 244, 266 N.E. 2d 131 (1970)

People vs. Dixon, 22 ILL. 2d 513, 177 N.E. 2d 224 (1961)

Rathbun vs. United States, 355 U.S. 107 (1957)

Simpson vs. Simpson, 490 F. 2d 803 (5th Circuit 1974

United States vs. Christman, 375 F. Supp. 1354 (N.D. CALIF. 1974)

Coolidge vs. New Hampshire, 403 U.S. 443 (1971)

Chapman vs. United States, 365 U.S. 610 (1971)

Terry vs. Ohio, 392 U.S. 1 (1968)

Sibron vs. New York, 392 U.S. 40 (1968)

United States vs. Foust, 461 F. 2d 328 (7th Circuit 1972)

People vs. Schmoll, 383 ILL. 280, 48 N.E. 2d 933 (1948)

People vs. Jackson, 57 Ill. App. 3d 720, 373 N.E. 2d 729 (1978)

Mapp vs. Ohio, 367 U.S. 643 (1961)

Wong Sun vs. United States, 371 U.S. 471 (1963)

Stanley vs. Georgia, 394 U.S. 557 (1969)

United States vs. Dichiarinte, 445 F. 2d 126 (7th Circuit 1971)

Stoner vs. California, 376 U.S. 483 (1964)

Silverman vs. United States, 365 U.S. 505 (1961)

People vs. Miller, 40 Ill. 2d 154, 238 N.E. 2d 407 (1968)

Constitutional Provisions.

United States Constitution Amendment IV
United States Constitution Amendment XIV
Illinois Constitution of 1970 Article one Section 2
Illinois Constitution of 1970 Article one Section 6
Illinois Constitution of 1970 Article one Section 12

Statutes,...

Chapter 38 criminal law and procedure § 14-1 (ILL. REV. STAT. 1979)
Chapter 38 criminal law and procedure § 14-2 (ILL. REV. STAT. 1979)
Chapter 38 criminal law and procedure § 14-5 (ILL. REV. STAT. 1979)
Chapter 38 criminal law and procedure § 108 A-1 (Ill. REV. STAT. 1979)
Chapter 38 criminal law and procedure § 108 A-3 (ILL. REV. STAT. 1979)
Chapter 38 criminal law and procedure § 108 A- 4 (Ill.REV. STAT. 1979)
Chapter 38 criminal law and procedure § 108 A-5 (ILL. REV. STAT. 1979)
Chapter 38 criminal law and procedure § 108 A-6 (ILL. REV. STAT. 1979)
Chapter 38 criminal law and procedure § 108 A-9 (ILL. REV. STAT. 1979)

OTHER.

Fishman, Wiretapping and Eavesdropping, Criminal Law Library (1978)

POINTS AND AUTHORITIES

II..... WAS PETITIONER'S SIXTH AMENDMENT RIGHTS VIOLATED WHERE TRIAL COURT PERMITTED HEARSAY EVIDENCE AT TRIAL WHICH PREJUDICED THE PETITIONER, AND DENIED HIM HIS RIGHT OF CONFRONTATION AS GUARANTEED BY THE UNITED STATES CONSTITUTION SIXTH AMENDMENT???

CASES .

Bruton vs. United States, 391 U.S. 123 (1968)

People vs. Clark, 17 Ill 2d 486, 162 N.E. 2d 413 (1959)

People vs. White, 28 Ill. 2d 23, 190 N.E. 2d 817 (1963)

People vs. Tyner, 30 Ill. 2d 101, 195 N.E. 2d 675 (1964)

Nelson vs. O'Neil, 402 U.S. 622 (1971)

People vs. Reeves, 360 Ill. 55, 195 N.E. 443 (1935)

People vs. Grizzle, 381 Ill. 2d 278, 44 N.E. 2d 917 (1942)

People vs. Monroe, 66 Ill. 2d 317, 362 N.E. 2d 295 (1977)

People vs. Carpenter, 28 Ill 2d 116, 190 N.E. 2d 738 (1963)

People vs. Green, 27 Ill 2d 39, 187 N.E. 2d 708 (1963)

People vs. Smuk, 12 Ill. 2d 360, 146 N.E. 2d 32 (1957)

People vs. Culver, 96 Ill. App. 2d 314, 238 N.E. 2d 161 (1968)

People vs. Williams, 98 Ill. App. 2d 136, 240 N.E. 2d 144 (1968)

People vs. Lagardo, 84 Ill. App. 2d 410, 228 N.E. 2d 241 (1967)

People vs. Ford, 89 Ill. App. 2d 69, 233 N.E. 2d 51 (1967)

People vs. Allen, 36 Ill. App. 3d 821, 344 N.E. 2d 825 (1976)

Constitutional Provisions

United States Constitution Amendment VI

Illinois Constitution of 1970 Article one Section 2

Illinois Constitution of 1970 Article one Section 8

Illinois Constitution of 1970 Article one Section 12

STATEMENT OF FACTS

On December 22, 1978, Andre Davis and Causia McCall were shot to death in an apartment on the South side of the City of Chicago, Cook County, Illinois. No persons were arrested for these crimes that day.

On December 23, 1978, petitioner (Dickie Gaines) telephoned his mother's home (Rebecca Gaines) and spoke to his mother and then to his brother, Michael Gaines (TR. 638-639). Petitioner spoke to his mother and brother separately, Mrs. Gaines finished her conversation with petitioner, and then got off the phone by handing her phone to Michael Gaines, who then started his conversation with petitioner. Investigator Robert Dwyer of the City of Chicago Police Department listened to both conversations by using an extension phone in another room (TR. 635). Mrs. Gaines consented to the eavesdrop of her conversation with petitioner (TR. 633-640).

There is no evidence that Michael Gaines consented to the eavesdropping of his telephone conversation with petitioner (Look through, TR. 632-640). There is no evidence that petitioner had knowledge of his conversations being monitored, and their is no evidence that petitioner consented to either of his conversations being monitored (C. 48) . Also see, (People vs. Gaines, No. 52794 decided 12-4-81 dissenting opinion). Copy of opinion attached to appendix.

Investigator Robert Dwyer, after Mrs. Gaines relinquished her phone and terminated her conversation with petitioner, continued to listen, through the use of an extension phone in another room, to the conversation between Michael Gaines and petitioner. At no time, before or after, did Investigator Robert Dwyer or anyone else attempt to get judicial authorization for this eavesdrop (TR. 636). Also see, (People vs. Gaines, No. 52794 decided 12-4-81, dissenting opinion). Copy of opinion attached to appendix.

1/ TR. refers to trial transcript.

2/ C. refers to the record.

As a result of Investigator Robert Dwyer listening to the conversations between petitioner and Mrs. Gaines, and between petitioner and Michael Gaines, certain physical and other evidence was obtained (TR. 640-642). Despite petitioner's pre-trial motion to suppress this evidence, renewed during trial, this evidence was admitted during trial over petitioner's continuing objections (TR. 636-637). This evidence was incriminating to petitioner and was a fruit of Investigator Robert Dwyer's listening to those telephone conversations.

Despite a severance from the trial of Michael Gaines, the trial judge allowed third parties to testify to what that co-defendant (Michael Gaines) said, and how the petitioner reacted when told of co-defendant's statements (TR. 648). These statements prejudiced and incriminated the petitioner, the maker of those statements, Michael Gaines, did not testify and was not, therefore subject to cross-examination by the petitioner.

Petitioner presented the issues of, whether illegal eavesdropping occurred and whether petitioner was denied his confrontation rights, on direct appeal to the Illinois Supreme Court. The State's high Court rejected both issues. See (People vs. Gaines, No. 52794 decided 12-4-81, pages 12-18) Copy of opinion attached to appendix.

ARGUMENT

I.. DID ILLEGAL EAVESDROPPING OCCUR, WHERE LAW ENFORCEMENT OFFICER LISTENED TO A TELEPHONE CONVERSATION BETWEEN PETITIONER AND CO-DEFENDANT, WITHOUT JUDICIAL APPROVAL OR WITHOUT CONSENT OF EITHER PARTY, WAS THIS A VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS????

At trial, evidence was admitted that was obtained when Investigator Robert Dwyer listened in to a telephone conversation between petitioner and his brother, Michael Gaines. Information gleaned from this conversation between petitioner and Michael Gaines, which led directly to other incriminating evidence against petitioner. Investigator Robert Dwyer listened to this telephone conversation on an extension phone in another room (TR. 639). Petitioner did not consent to this, nor did Michael Gaines consent to Investigator Robert Dwyer listening to the conversation. There is no where in the record, where either party consented to the conversation being monitored. At no time, before or after listening to this conversation did the prosecution or police obtain the required judicial approval.

Illinois Revised Statutes 1979, Chapter 38 Section 14-5, provides that evidence obtained in any violation of the "eavesdropping" statute is not admissible in any criminal trial. "A person commits eavesdropping when he: (a) uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (2) with the consent of any one party to such conversation and in accordance with Article 108 A of the Code of Criminal Procedure of 1963"... (Ill. Rev. Stat. 1979, Chapter 38 Section 14-2)

Article 108 A-3 Code of Criminal Procedure of 1963" states that when one party consents to an eavesdropping, a judge may grant approval if the procedure stated therein is followed. This procedure states that an application for obtaining this judicial approval must be in writing upon oath or affirmation; state the applicant's authority to make such request; give the identity of the officer making the application and the State's Attorney authorizing the application; a statement of facts to justify the order including the details of the felony involved, the type of communication involved, the identity of the consenting party,

and the identity, if known, of the persons whose conversations are to be overheard; state the time period involved; state previous applications and whether approval was or was not granted involving those persons; and for an extension of time the facts obtained so far must be revealed (or an explanation for the failure to obtain the results). Article 108 A-6 Code of Criminal Procedure of 1963" provides for an emergency exception to those procedures and holds that the same procedures noted above must be taken within 48 hours of the commencement of the eavesdropping. Article 108 A-8 Code of Criminal Procedure of 1963" states that within a reasonable time, but not later than 90 days, the judge shall reveal relevant information concerning the application and conversations overheard to the person who didn't consent. It was conceded by the prosecution at petitioner's trial that the statute was not complied with (TR. 636, C. 48). Article 108 A-9 Code of Criminal Procedure of 1963" states that any person aggrieved by eavesdropping may move to suppress the contents of the conversation or evidence derived therefrom on the ground that the conversation was unlawfully overheard and recorded. The simple issue presented here is whether or not an eavesdropping on a telephone conversation by using an extension phone in another room requires compliance with the statutes.

Before trial, a motion, renewed during trial, to suppress the evidence obtained when Investigater Robert Dwyer listened in on an extension phone was denied (TR. 635-637, C. 48). If an eavesdropping was committed, then all the evidence obtained therefrom was inadmissible at trial.

"A person commits eavesdropping when he: (a) uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto...." (Ill. Rev. Stat. 1979, Chapter 38 Section 14-2). "An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means (Ill. Rev. Stat. 1979, Chapter 38 Section 14-1). The question becomes more simply, is an extension telephone "any device capable of being used to hear or record oral conversation,... conducted,... by telephone??????

Invetigator Robert Dwyer's listening in on a telephone conversation through the use of an extension phone was an eavesdropping covered and restricted under the Illinois Statutes. In People vs. Perez, 92 Ill. App. 2d 366, 235 N.E. 2d 355 (1968), A police officer listened to a phone conversation with an apparatus that was put on the earphone of a telephone and had an extension that anyone else could hear with. The Court found this to be an eavesdropping device under the

proscription of the statute. The extension phone used in this instant case by Investigater Robert Dwyer was "any device capable of being used to hear or record oral conversation...." and was used for exactly the same purpose as the device forbidden in Perez.

This is emphatically not a case in which only, the officer's ear was used. Michael Gaines did not hold a phone in such a way that both he and Investigator Robert Dwyer could hear from the one phone. A second device, an extension phone in another room, was used. This distinguishes, People vs. West Diversey Ave; Second Floor Apt; Chicago, 96 Ill. App. 2d 479, 238 N.E. 2d 229 (1968); People vs. Brown, 131 Ill. App. 2d 244, 266 N.E. 2d 131 (1970); and People vs. Giannopoulus, 20 Ill. App. 3d 338, 314 N.E. 2d 237 (1974).

In People vs. Dixon, 22 Ill. 2d 513, 177 N.E. 2d 224 (1961), An extension phone was held not to be an eavesdropping device under the then existing and different ststute (Ill. Rev. Stat. 1959, Chapter 38 Section 206.1 et. seq.) which defined an eavesdropping device as "any device employing electricity". The Dixon decision relied on the holding of the Supreme Court of the United States, Rathbun vs. United States, 355 U.S. 107 (1957), where under a comparable then in existence Federal Statute, 47 U.S.C. 605, it was held that use of an extension phone does not constitute an interception or the use of a device employing electricity.

Those statutes (Mention Electricity) are certainly different from the present and more inclusive Illinois and Federal Statutes which cover any device. In addition, to the extent that Dixon is contrary to People vs. Kurth, 34 Ill. 2d 387, 216 N.E. 154 (1966), it was overruled by Kurth. " The Illinois statute retains in substance the complete prohibition against eavesdropping which had previously been in effect in Illinois", People vs. Kurth, supra, 216 N.E. 2d at 158 . In the concurring opinion of Kurth, supra at 159, eavesdropping is defined as "to listen secretly to the conversation of others". a extension phone, "any device", was used in this case by Investigator Robert Dwyer to secretly listen to the conversation of petitioner and Michael Gaines. The new statute has been described as increasing the protection of rights, People vs. Richardson, 60 Ill. 2d 189, 195, 328 N.E. 2d 260 (1975); People vs. Kezerian, 77 Ill. 2d 121, 125, 395 N.E. 2d 551 (1979); and People vs. Satek, 78 Ill. App. 3d 543, 396 N.E. 2d 1133, 1136, 1137-8 (1979).

It is important to note that the statute relied upon in Rathbun, supra, has been changed. The situation is now governed by Title III of the Omnibus Crime Bill of 1968, 18 U.S.C.A. Section 2510-2520, prohibiting the interception of oral communication through the use of any electronic, mechanical, or other device. An exception is provided for a telephone or component thereof used by an investigative or law enforcement officer in the ordinary course of his duties (18 U.S.C.A. § 2510 (5) (a) (ii).

In People vs. Tebo, 194 N.W. 2d 517, 37 Mich. App. 141 (1971), The Court assumes very easily than an entension phone is "any device" under the 18 U.S.C.A. 2510 (5) (a) (ii). The key issue in Tebo is whether the device was used in the ordinary course of the officer's duties. This discussion is irrelevant to the Illinois statute, but shows that an extension phone is any device. If it were not so, there would be no need to determine whether or not the exception in the Federal Statute was applicable..

In United States vs. Harpel, 493 F.2d 346 (10th Circuit 1974), The defendant was convicted of violations of the eavesdropping statute (18 U.S.C. Section 2511 (c)), Through the use of an extension phone. The Court held that an extension phone was "any device" and continued on to decide whether the defendant's actions were made lawful by the exception (irrelevant in the instant case of petitioner). "The subject telephone conversations clearly qualified as a "wire communication" as defined in 18 U.S.C. Section 2510 (1). It was, therefore, incumbent upon the government to establish only that this wire communication had been "intercepted" (defined as acquisition of any wire or oral communication, through the use of any device) , United States vs. Harpel, supra, 493 F. 2d at 349.

In Rickenbacker vs. Rickenbaker, 226 S.E. 2d 347 (Supreme Court of North Carolina 1976), A husband had obtained information about his wife by using an extension telephone installed in his office. This was held not to come under the exception for " the ordinary course of business" and that his interception of his wife's telephone communication was therefore illegal under Federal Law. Again, it must be noted that if the Court finds it necessary to discuss the exception to the rule, it must have first come to the conclusion that an extension phone is " any device" forbidden to be used to "eavesdrop" on another's conversation.

In United States vs. Savage, 564 F. 2d 728, (5th Circuit 1977), A motel switchboard operator gave the police information concerning criminal conduct which she had overheard. The Court found the interception to be inadvertent and applied the exception (Section 2511 (2) (a) (i), pertaining to employees or agents of the telephone company or switchboard operators. More significant is the holding as a matter of course and without discussion that the act was violated when the switchboard operator gave her headset to the policemen so that he could listen to the conversation, United States vs. Savage, supra, 564 F. 2d at 731. There is little, if any, difference between an extension phone and a headset. They are both used to allow a third party to eavesdrop on a private two-party call.

In Kupley vs. State, 560 P. 2d 146, (Supreme Court of Nevada 1977), It was held that the State law, (Nevada Revised Statute, 179.430), patterned after the Federal Law, ("any sending or receiving equipment), prohibited the police from using a suction cup device which attached to the receiver of their informant's telephone telephone which allowed them to overhear the conversation. An extension phone is used for the exact same purpose.

In Anonymous vs. Anonymous, 558 F. 2d 677 (2nd Circuit 1977), An action was brought by a wife against her husband alleging intereceptions and tapings of her conversations with their daughter in his home (Custody was with the father). The decision held that the father's actions were covered by the exception written into the Federal Statute. This language was put in because "nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related conversation, Anonymous, supra, at 679, citing hearings on the Anti-Crime Program before Subcommittee No. 5 of the House Judiciary Committee; 90th Congress; 1st Session 901 (1967). In order to get to a discussion of the exception, the Court must, and obviously did, find that and extension phone is "any device".

In State vs. Nova, 361 So. 2d 412 (Supreme Court of Florida 1978), The Court decided a case where the defendant was convicted of first degree murder on evidence obtained when the victim's supervisor listened, through the use of an extension telephone, to a conversation between the defendant and the victim. This took place while the victim was at work. Again, the key issue was whether the supervisor's eavesdropping was done in the ordinary course of business. The Court had "no trouble" holding that the supervisor's actions in using an extension telephone was "eavesdropping" and the major issue in the opinion deals with the exception.

In State vs, Dwyer, 585 P. 2d 900, (Ariz. App. 1978), A nosy telephone operator illegally listened in to a phone conversation which led to the alleged perpetrators of a crime. The evidence, and all evidence derived from it, was suppressed. The Court note that:

> "They also intercepted within the meaning of the statute (18 U.S.C. 2510 et. seq.) because they orally acquired the contents of the telephone conversation between (one party) and appellee through the use of an electronic device."

In this case there was no police misconduct, just private misconduct and the evidence was suppressed.

In Briggs vs, American Air Filter Co, Inc, 455 F. Supp. 179 (U.S.D.C. N.D. Georgia 1978), A civil suit was instituted for unlawful monitoring of a telephone call between the plaintiff's. A manager of the defendant's company picked up an extension phone and listened to a phone conversation while the plaintiff's were discussing confidential business matters, (as the defendant had suspected and which was the reason for the monitoring). Again, the opinion concerns itself with whether the eavesdrop was in the ordinary course of business and as a matter of course includes extension phones within the normal prohibitions of the act.

In Fishman, Wiretapping and Eavesdropping, Criminal Law Library (1978), it is stated, at page 39 Section 23 that:

> " As a rule, Courts have held that telephones and extension phones are "devices", and cannot be used to intercept a conversation without a warrant unless a participant to the call consents although in unusual circumstances a few Courts have found exceptions to the rule."

Only two cases are cited as exceptions to the rule, one is People vs. Giannopoulus, supra, where the officer listened in on the same phone as the consenting party who had held the phone in such a way, as to allow both the officer and the consenting party to hear from the one phone. The Second case cited is, Simpson vs, Simpson, 490 F. 2d 803, (5th Circuit 1974), where an

extension phone was not involved in a suit by the wife for civil damages against her husband who taped and recorded certain conversations of his wife with a third party. The Court itself noted that the decision is "limited" to the specific facts of this case. No public official is involved, nor is any private person other than appellee, and the locus in quo does not extend beyond the marital home of the parties; Simpson vs. Simpson, supra, 490 F. 2d at 810. The two cases consider to be exceptions do not even deal with an extension phone anyway and are clearly against the weight of other and more factually similar cases.

In James vs. Newspaper Agency Corp, 591 F. 2d 579, (10th Circuit 1979), The defendant had installed, by the telephone company a monitoring device which would permit them to listen in on telephone conversations between employees and clients to the end that the employees could be trained and instructed on how to better deal with the general public. All effected personnel, including the plaintiff's were notified of this monitoring. The Court noted that in Harpel, supra, they held that the surreptitious use of a telephone extension to record a private telephone conversation did not qualify under the exception of 18 U.S.C. Section 2510 (5) (a) and that here the installation was not surreptitious and was for a legitimate business purpose. Again, they obviously had to first find that the device used was "any device".

An extension phone is "any device" and can be,, and was here in the petitioner's case, used to intercept and acquire knowledge of a telephone conversation between petitioner and Michael Gaines. No Illinois Court has expressly ruled on this issue since People vs. Dixon, supra, not only was Dixon decided under a different and less inclusive statute, its basic holding was overruled in People vs. Kurth, supra. Even the case relied on by the Illinois Supreme Court in Dixon, United States vs. Rathbun, and its since changed statute, have been consistently and constantly distinguished under the new act. Too, since Dixon, the Fourth Amendment has undergone major changes in the law of eavesdropping, See Kats vs. United States, 389 U.S. 347 (1967).

Perhaps the only recent decision expressly holding that an extension device is not an intercepting device within the Federal Statute is Unied States VS. Christman, 375 F. Supp. 1354 (N.D. California 1974). This single decision has been constantly criticized and rejected.

Interpretations of the Illinois Act must make it at least (if not more) restrictive than the Federal Act. If extension phones eavesdropping violates and is included under the general provisions of Federal Law, it must be prohibited under Illinois Law. Investigator Robert Dwyer eavesdropped within the meaning of the Illinois Statute. This violated the petitioner's rights as guaranteed by the Illinois Statute and the Fourth Amendment, and requires a new trial where evidence obtained through eavesdropping was admitted at trial. Despite petitioner's continuing objections to such evidence being admitted at trial (TR. 636-637).

In Campiti vs. Walonis, 611 F. 2d 389, (1st Circuit 1979), The Court again holds that an extension phone is "any device" .

Petitioner cites the following cases only to show, that the Courts has held that an extension phone is "any device", United States vs. Harpel, 493 F. 2d 364, (10th Circuit 1974); United States vs. Savage, 564 F. 2d 728 (5th Circuit 1977); Anonymous vs. Anonymous, 558 F. 2d 677, (2nd Circuit 1977); Briggs vs. American Air Filter Co. Inc, 455 F. Supp. 179, (U.S.D.C. N.D. Georgia 1978); James vs. Newspaper Agency Corp, 591 F. 2d 579, (10th Circuit 1979); Campiti vs. Walonis, 611 F. 2d 389 (1st Dist. 1979); People vs. Tebo, 194 N.W. 2d 517 (1971); Rickenbaker vs. Rickenbaker, 226 S.E. 2d 347, (Supreme Court of North Carolina 1976); and State vs. Dwyer, 585 P. 2d 900, (Ariz. App. 1978).

Petitioner cites, other cases that involves devices which do the same job as an extension telephone, that is to allow third parties to listen surreptitiously to conversations...

It is a fundamental rule that a search and seizure outside the scrutiny of the judicial process, without a duly authorized search warrant, is per se unreasonable unless it falls within one of the well delineated exceptions to this rule Coolidge vs. New Hampshire,403 U.S. 443, 444, 445 (1971); Chapman vs. United States, 365 U.S. 610 (1961). During petitioner's trial, the prosecutor did not try to justify the unreasonable search and seizure of petitioner's telephone conversation with Michael Gaines, by any of the exceptions to the rule (TR. 635, C. 48).

While Investigator Robert Dwyer initially had the consent of a party to the conversation, Mrs. Gaines, when she spoke to the petitioner, this consent was vitiated when Mrs. Gaines withdrew from the conversation and gave her phone to Michael Gaines (TR. 633-640). Petitioner was now talking to Michael Gaines. Neither of these parties consented to Investigator Robert Dwyer's listening to their conversation on a separate extension phone in a different room. When Mrs. Gaines withdrew from her conversation with petitioner, Investigator Robert Dwyer's ability and privilege to listen in on subsequent conversations was ended. Because Investigator Robert Dwyer did not have permission to listen to the subsequent conversation between petitioner and Michael Gaines. The Fourth Amendment clearly applies to investigative stages of police conduct, Terry vs. Ohio, 392 U.S. 1 (1968); Sibron vs. New York, 392 U.S. 40, (1968); United States vs. Foust, 461 F. 2d 328, (7th Circuit 1972). Consent can't be used to conduct a larger more general search, United States vs. Dichiarinte, 445 F. 2d 126, (7th Circuit 1971). See also, Stanley vs. Georgia, 394 U.S. 557 (1969).

An arresting officer has no right to search beyond the limit proscribed in a consent to search, People vs. Schmoll, 383 Ill. 280, 48 N.E. 2d 933 (1948). Where consent is limited to one search, it cannot be used to justify a second search, People vs. Jackson, 57 Ill. App. 3d 720, 373 N.E. 2d 729 (1978). By Investigator Robert Dwyer continuing to listen on the extension phone in another room, after his privilege had ended, Investigator Robert Dwyer made a second search. For this there is "no" justification. In United States vs. Savage, 564 F. 2d 728 (5th Circuit 1977), A person within an exemption gave her listening device to a police officer. The Court found that this change gave rise to a violation. The privilege had been lost. Here, too, in petitioner's case, when Mrs. Gaines gave up the phone her ability to allow an eavesdrop ended.

The Fourth Amendment governs not only tangible items, but also the recording of oral statements, overheard within any technical trespass under local property law, Silverman vs. United States, 365 U.S. 505, 511 (1961); Katz vs. United States, 389 U.S. 347, 353 (1967). Investigator Robert Dwyer's activity in listening to petitioner's words violated the privacy upon which the petitioner justifiably relied on when talking to Michael Gaines and this, therefore, constituted a search and seizure within the meaning of the Fourth Amendment, Katz vs. United States, supra, 389 U.S. at 353.

The decision makes it clear that protected Fourth Amendment rights are not to be eroded by strained application of the law of agency or by unrealistic doctrines of apparent authority, Stoner vs. California, 376 U.S. 483 (1964); People vs. Miller, 40 Ill. 2d 154, 238 N.E. 2d 407 (1968).

The fruits of this illegal search and seizure led to other incriminating evidence against the petitioner, and was admitted into evidence at trial, in violation of WONG SUN vs. UNITED STATES, 371 U.S. 471 (1963). Also these violations of petitioner's Fourth Amendment rights, deprived him of the right to be free from unreasonable searches and seizures, and requires a new trial, where such evidence and fruits of an illegal search and seizure was admitted at trial, Mapp vs. Ohio, 367 U.S. 643 (1961).

In People vs. Kurth, 34 Ill. 2d 387, 216 N.E. 2d 154 (1966), which held that a device installed by a party does not preclude another party from having the conversation excluded. The Court overruled, People vs. Dixon, 22 Ill. 2d 533, 177 N.E. 2d 224 (1961); only with respect to that issue. Which is precisely the issue here in petitioner's case.

Article One Section 6, Illinois Constitution of 1970, provides that there is a right to be secure against "interceptions" of communications by eavesdropping devices or other means. Investigator Robert Dwyer, violated petitioner's Fourth Amendment rights which also violated petitioner's Fourteenth Amendment rights of due process of law, and equal protection of laws. Article One Section 2, Illinois Constitution of 1970, provides that no person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of laws. Article One Section 12, Illinois Constitution of 1970, provides that every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly. Investigator Robert Dwyer, did not have consent of petitioner or Michael Gaines to listen to their conversation, through use of an extension phone in another room. Evidence which is obtained illegally and used at trial requires a new trial.

ARGUMENT

II.. WAS PETITIONER'S SIXTH AMENDMENT RIGHTS VIOLATED WHERE TRIAL COURT PERMITTED HEARSAY EVIDENCE AT TRIAL WHICH PREJUDICED THE PETITIONER, AND DENIED HIM HIS RIGHT OF CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT????

During petitioner's trial, Investigator Robert Dwyer was permitted to testify that the petitioner was identified at a lineup and that Michael Gaines had made statements incriminating the petitioner. At first, Michael Gaines was a co-defendant and was to be tried together with the petitioner. A motion for severance was made by defense counsel to prevent this statement by Michael Gaines from being heard by a jury determining the guilt or innocence of petitioner (C. 52). The State did not oppose the motion for severance because the statements of Michael Gaines did not fall within any exception to the rule announced in Bruton vs. United States, 391 U.S. 123 (1968); (TR. 2). The motion for severance was granted by the trial judge and petitioner and Michael Gaines had separate trials with different juries.

However, the State was improperly allowed to do what the severance was to prevent:

> "Q. Will you please relate to the jury what you said to the defendant and what he said to you??
>
> A. To the best of my recollection i informed him that he had just been identified by an eyewitness as the individual who had shot and killed Mr. Davis and Mr. McCall.
>
> I also told him that he had been implicated by his own brother as the person who shot and killed these two--
>
> Mr. Walsh: I'll object, Judge. Move for a mistrial.
>
> The Court: Objection overruled,
>
> Motion for mistrial is denied.

Mr. Boyle: Q. Please continue, Officer.

A. I also called to his attention that we did in fact have the murder weapon in custody and that his brother had given us an accounting of the whole sequence of events.

Mr. Walsh: Objection and move for a mistrial.

(Emphasis Added, TR. 648).

The State put into evidence the statement, that Investigator Robert Dwyer heard from the mouth of Michael Gaines. These statements were incriminating to petitioner. Since Michael Gaines did not testify at the trial of petitioner's these statements were inadmissible hearsay. Defense counsel could not impeach the validity of the statements. The statements were made out-of-court, by a non-testifier, and admitted into evidence to prove the truth of the matter asserted. This is classic hearsay.

In People vs. Smuk, 12 Ill. 2d 360, 146 N.E. 2d 32 (1957), It was held that out-of-court declarations or statements of any kind made by a third party against the accused, and made in his absence and without his knowledge are inadmissible as evidence against him. In People vs. Carpenter, 28 Ill. 2d 116, 190 N.E. 2d 738, (1963), The Court held that:

> " The fundamental purpose of the hearsay rule was and is to test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is offered... The essential feature, without which testimonial offerings must be rejected, is the opportunity for cross-examination of the party whose assertions are offered to prove the truth of the act asserted." People vs. Carpenter, 190 N.E. 2d at 741.

In People vs. Clark, 17 Ill. 2d 486, 162 N.E. 2d 413 (1959), There was no joint trial but the hearsay was admitted, A "confession or admission made, by an accomplice outside the presence of the defendant are not admissible against the latter whether or not the parties are jointly tried.

In People vs. White, 28 Ill. 2d 23, 190 N.E. 2d 817 (1963), A co-defendant told a police officer that the defendant said he wanted to get out of town because he shot a cop. No severance was granted. The Court noted that "where there has been a severance, the admission of this type of evidence is held to be prejudicial, People vs. White, 190 N.E. 2d at 818. This type of evidence was found to be admitted in error whether or not there was a severance, People vs. Clark, 50 Ill. 2d 292, 278 N.E. 2d 782 (1972); People vs. Culver, 96 Ill. App. 2d 314, 238 N.E. 2d 161 (1968); People vs Williams, 98 Ill. App. 2d 136, 240 N.E. 2d 144 (1968); People vs. Green, 27 Ill. 2d 39, 187 N.E. 2d 708 (1963); and People vs. Lagardo, 84 Ill. App. 2d 410, 228 N.E. 2d 241 (1967).

A police officer's repetition of a co-defendant's out-of-court statement implicating another defendant is hearsay when used to prove the truth of the matter asserted in the statement, Nelson vs. O'Neil, 402 U.S. 622 (1971); People vs. Tyner, 30 Ill. 2d 101, 195 N.E. 2d 675 (1964). It is error to permit the police to testify to statements made and things done by the victim by way of identifying the defendant, People vs. Reeves, 360 Ill. 55, 195 N.E. 2d 443 (1935). Where a witness has no personal knowledge of facts but his knowledge is derived entirely from another person, the testimony is incompetent and inadmissible hearsay, People vs. Grizzle, 381 Ill. 278, 44 N.E. 2d 917 (1942). Police officer's testimony that he saw a certain person pick the defendant from a lineup was hearsay and could not be used to prove such, People vs. Ford, 89 Ill. App. 2d 69, 233 N.E. 2d 51 (1967). When an agent testified that a third party (A Non-Testifier) came out of a bar and told him that the defendant was selling narcotics, this evidence was hearsay and improperly admitted, People vs. Monroe, 66 Ill. 2d 317, 362 N.E. 2d 295 (1977).

Before petitioner's trial, defense counsel, the prosecution and the trial judge realized that statements made by Michael Gaines constituted a serious potential for error. For this reason the severance was granted. Yet, the State was still allowed to use this evidence after agreeing that a severance should be granted (TR. 2). In People vs. Allen, 36 Ill. App. 3d 821, 344 N.E. 2d 825 (1976), The State assured the Court of its intention not to use such a statement after defense counsel moved for severance. The trial Court denied the request when the State assured the Court that it would not use the statement. Nevertheless, the jury was informed of the out-of-court person's incriminating statement. This was held to be reversible error.

In this instant case, too, despite precautions taken, the inadmissible evidence was permitted and was prejudicial to petitioner. The petitioner had no opportunity to confront and cross-examine the maker, "Michael Gaines" of these statements. All parties knew of their prejudicial nature, and that the maker, "Michael Gaines" would not testify at petitioner's trial. This was the very reason for the severance. The prosecution was allowed to backdoor this evidence. This was a violation of petitioner's rights as guaranteed by the Sixth Amendment to confront witnesses against him. In addition this violated, Article One Section 8 of the Illinois Constitution of 1970. This inadmissible evidence, which was admitted at petitioner's trial definitely had a impact on the jury, in reaching their verdict, such inadmissible evidence that is admitted at trial constitutes reversible error, People vs. Allen, 36 Ill. App. 3d 821, 344 N.E. 2d 825 (1976).

CONCLUSION

For the reasons argued herein, petitioner Dickie Gaines, respectfully request that petition for writ of certiorari is granted to review the judgment of the Illinois Supreme Court, so that matters can be carefully reviewed to the end that petitioner's conviction be reversed.

Respectfully Submitted

Dickie Gaines

Dickie Gaines, #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

Appearing Pro Se.

Subscribed and sworn to before me

this 3 day of March 1982

Charles R. Mattingly

Notary Public.

My Commission Expires October 1, 1985

My Commission Expires.

Appendix

TABLE OF CONTENTS TO APPENDIX

1. Illinois Supreme Court order denying petition for rehearing. Marked as, Exhibit A

2. Copy of Illinois Supreme Court opinion in, People vs. Gaines, No. 52794, decided on 12/4/81. Marked as, Exhibit B

3. Also Marked as, Exhibit A, is the Illinois Supreme Court modified pages to the opinion in, People vs. Gaines, No. 52794, Decided 12/4/81.

4. Copy of Illinois Supreme Court order, to stay the mandate pending the timely filing and disposition of a petition for writ of certiorari in the United States Supreme Court. Marked as, Exhibit C.

5. Table of contents of the "record". Marked as, Exhibit D.

52794

ILLINOIS SUPREME COURT
CLERK'S OFFICE
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

Robert H. Gillespy
Clerk

January 29, 1982

Exhibit A

Mr. Carl M. Walsh
Attorney at Law
39 S. LaSalle St., S#920
Chicago, IL 60603

No. 52794 - People State of Illinois, appellee, vs. Dickey Gaines, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today denied the petition for rehearing in the above entitled cause. Certain changes have been made in pages 1, 15, 16, 28, 38, and 39 of the opinion. Please substitute the enclosed pages in the copy of the opinion previously forwarded to you.

Very truly yours,

Robert H. Gillespy

Clerk of the Supreme Court

RHG/hc
Enclosure

Docket No. 52794--Agenda 2--March 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v.
DICKIE GAINES, Appellant.

MR. JUSTICE WARD delivered the opinion of the court:

The defendant, Dickie Gaines, and his brother, Michael Gaines, were jointly indicted by the grand jury of Cook County for the murder of Andre Davis, the murder of Causia McCall, the attempted murder of Lenious Thomas, the armed robbery of Davis, and the armed robbery of Thomas. These felonies were all committed in a single criminal episode which took place in the early morning hours of December 22, 1978, at a house on the south side of Chicago. The indictment charged that a handgun had been used in the commission of the offenses, and thus the accused were also charged with armed violence.

A motion by the defendant for severance was granted, and he was tried by a jury, which found him guilty on all charges. (Michael Gaines was tried before a separate jury, found guilty except for the robbery of Davis, and was sentenced to imprisonment. His appeal is now pending in the appellate court.) In Dickie Gaines' trial the State requested a separate sentencing proceeding, which was heard by the same jury. The jury determined that there were no mitigating factors sufficient to preclude the imposition of the death sentence. On November 2, 1979, the court sentenced the defendant to death on his convictions of murder. The court directed that the sentence be carried out on January 28, 1980, and that the defendant be imprisoned in the penitentiary until that time. An appeal to this court was automatically perfected pursuant to article VI, section 4(b), of the 1970 Illinois Constitution and Rule 603 (73 Ill. 2d R. 603). The trial court stayed the execution pending this appeal.

The circumstances of the crimes were testified to by Thomas, who was called as a witness by the State. The defendant did not testify and offered no evidence at the trial. Michael Gaines was not called as a witness by either party. Except with respect to the charges of armed robbery of Thomas

conversations the police had already received information pointing to the defendant from interviews with the victim Thomas and with friends of the defendant whom the latter contacted following the crime. The defendant thus cannot complain that his remarks were incriminatory, and that was not the basis of his objection. Both his brief and statements made to the trial court by his counsel show that his objection is based on the assumption that the eavesdropping of his conversation with his brother enabled the police to locate and to recover the murder weapon.

This assumption is not supported by the evidence. Statements regarding the location of the gun were also made by Michael Gaines during the telephone conversation, and those statements could have been heard by the police officers who were present when they were made. In addition, Officer Fleming, who was also called as a witness, testified that he had had a face-to-face conversation with Michael, after which Michael took him up to the second floor, where Fleming recovered the gun.

The claim by the defendant that the admission of the gun was prejudicial, moreover, has been abandoned on this appeal. At the trial, the defendant did object to the admission of the gun, presumably on the theory that section 14--5 of the Criminal Code of 1961 bars the admission of other evidence obtained through illegal eavesdropping (see People v. Maslowsky (1966), 34 Ill. 2d 456, 464-65), but he does not now assert that its admission was error, and he does not contend that his conviction of murder was not proved beyond a reasonable doubt.

The monitoring of the defendant's telephone conversation, in any event, was not proscribed by section 14--2(a), for an extension telephone is not an eavesdropping device as that term is defined by section 14--1(a). People v. Dixon (1961), 22 Ill. 2d 513, so held with respect to the statutory antecedent of section 14--1(a) (Ill. Rev. Stat. 1959, ch. 38, par. 206.1), and that holding is applicable as well to the present section.

The defendant seeks to distinguish Dixon on the ground that the provision involved there defined an eavesdropping device as "any device employing electricity" (22 Ill. 2d 513, 516), a qualification omitted from section 14--1(a). The decision in Dixon, of course, could not have rested on the proposition that an extension telephone is not a device employing electricity. The basis of the decision was rather that the statute is directed against the use of devices other than the telephone itself when the latter has not been functionally altered.

We also do not agree with the defendant's contention that Dixon was overruled by People v. Kurth (1966), 34 Ill. 2d 387. In Kurth an electronic device to record a telephone conversation was used. The decision turned on the holding that even though the device had been installed by one of the parties to the conversation, another party was not precluded from having the conversation excluded from evidence. The court overruled Dixon only with respect to that issue. See 34 Ill. 2d 387, 395.

The significance of a participant's lack of consent to the monitoring or recording of a telephone conversation has varied with the changes which the legislature has made from time to time in section 14--2. (See Ill. Ann. Stat., ch. 38, par. 14--2, Historical Note (Smith-Hurd 1979); People v. Kezerian (1979), 77 Ill. 2d 121, 126; People v. Richardson (1975), 60 Ill. 2d 189). But the question of consent becomes material only if an eavesdropping device has been employed.

The defendant refers us to language in United States v. Harpel (10th Cir. 1974), 493 F.2d 346, 351-52, that an extension telephone is an eavesdropping device when it is used surreptitiously, as it was here. Harpel involved a conviction for violation of a Federal statute forbidding the interception and disclosure of wire communications (18 U.S.C. §§ 2510 to 2520 (1970)). Section 2510(5)(a)(i) of the Federal act, which defines those devices whose use constitutes unlawful interception, is structured so differently from section 14--1(a) that the construction given to it

1973, ch. 38, par. 1005--4--1(a)), which specifies the sentencing procedures to be followed in criminal proceedings generally, provided:

> "After a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court shall:
>
> (1) consider the evidence, if any, received upon the trial;
>
> (2) consider any presentence reports;
>
> (3) consider evidence and information offered by the parties in aggravation and mitigation;
>
> (4) hear arguments as to sentencing alternatives; and
>
> (5) afford the defendant the opportunity to make a statement in his own behalf."

Following the enactment in 1977 of the amendatory legislation to section 9--1 of the Criminal Code of 1961 which established the present bifurcated trial for aggravated murder, subsection 5--4--1(a) of the Unified Code of Corrections was amended by adding at its beginning the exclusionary phrase, "Except when the death penalty is sought under hearing procedures otherwise specified." (Pub. Act 80--1099; Pub. Act 80--1387.) This legislation had become effective when the defendant committed the crimes of which he was here convicted, and therefore no right to be given an opportunity to make a statement in his own behalf was conferred on the defendant by virtue of section 5--4--1(a).

So far as section 9--1 of the Criminal Code of 1961 is concerned, subsection (e) of course allows the defendant to testify at the sentencing hearing, but it does not require in terms that the defendant be given an opportunity to speak other than as a witness. A defendant in a criminal proceeding who testifies in his own behalf is subject to reasonable cross-examination (People v. Miller (1930), 342 Ill. 244, 252; McGautha v. California (1971), 402 U.S. 183, 215, 28 L. Ed. 2d 711, 731, 91 S. Ct. 1454, 1471), and no reason appears why an exception to that principle should be read into section 9--1(e) by implication.

his conviction. If the death penalty act is not so construed, he urges, then it is invalid under the equal protection clause as creating an unreasonable classificaton between those persons who are sentenced to death and those who are sentenced to imprisonment.

So far as the question of statutory construction is concerned, the defendant's argument is plainly unsound. Both in 1949, when the Post-Conviction Hearing Act was enacted, and in 1965, when section 122--1 was amended to increase the limitations period to 20 years after conviction, the death penalty existed in Illinois, its legitimacy as yet undisturbed by Furman v. Georgia (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, and Moore v. Illinois (1972), 408 U.S. 786, 33 L. Ed. 2d 706, 92 S. Ct. 2562. The present death penalty act, which was passed in 1977, contains no provision that the execution of a death sentence should be stayed for 20 years (during which the defendant would necessarily be kept in prison), and it is inconceivable that the legislature intended such an anomalous result. Nor is it true that the legislature may not constitutionally differentiate between those persons who have been sentenced to death and those who have been sentenced to imprisonment. People ex rel. Tucker v. Kotsos (1977), 68 Ill. 2d 88, 96-98.

Whether new evidence exculpating the defendant would be discovered, and whether some future decision will announce a new doctrine which would invalidate his conviction are at best speculative. But that consideration aside, the deprivation of any such potential benefits does not spring from the limitations of the Post-Conviction Hearing Act, but from the defendant's death.

The defendant's argument thus reduces to that proposition that the death penalty is per se unconstitutional. That view was adopted by the Supreme Judicial Court of Massachusetts in District Attorney v. Watson (1980), __ Mass. ___, 411 N.E.2d 1274, cited by the defendant, where the court held that the death penalty violated a provision of the State Constitution forbidding cruel or unusual punishment. The court's opinion cites

the same loss of potential future benefits on which the defendant rests his argument here. (See ___Mass. ___, ___, 411 N.E.2d 1274, 1282.) Such a view finds no support, however, in either the decisions of this court or those of the United States Supreme Court, only two of whose members subscribe to it. See, e.g., Gregg v. Georgia (1976), 428 U.S. 153, 227, 231, 49 L. Ed. 2d 859, 904, 907, 96 S. Ct. 2909 (dissenting opinions of Justice Brennan and Justice Marshall).

For the reasons given in this opinion, the judgment of the circuit court of Cook County convicting the defendant of murder and sentencing him to death is affirmed. It is directed that the sentence shall be carried out on Wednesday, September 22, 1982, at the Illinois State Penitentiary in Joliet.

Judgment affirmed.

MR. CHIEF JUSTICE GOLDENHERSH, concurring:

For the reasons stated in my concurrence in People v. Lewis (Nov. 13, 1981), No. 52338, I concur in this opinion.

MR. JUSTICE CLARK, dissenting:

On December 23, 1978, Officer Dwyer, at the home of the defendant's mother and with her permission, monitored the phone conversation between the defendant and his mother. He did this by picking up the extension telephone located in the next room. Under section 14--2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 14--2), a person does not commit eavesdropping if all of the parties to the conversation have consented or any party gives permission and the use of an eavesdropping device has been judicially authorized (Ill. Rev. Stat. 1977, ch. 38, par. 14--2; Ill. Rev. Stat. 1977, ch. 38, par. 108A et seq.). Section 108A--6 of the Code of Criminal Procedure of 1963 provides for an emergency exception to normal procedures. If a reasonable effort has been made to contact the appropriate State's Attorney, a law-enforcement officer may use an eavesdropping device in an "emergency situation." An emergency situation exists when the conversation to be

EXHIBIT-B.

Docket No. 52794--Agenda 2--March 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v.
DICKIE GAINES, Appellant.

MR. JUSTICE WARD delivered the opinion of the court:

The defendant, Dickie Gaines, and his brother, Michael Gaines, were jointly indicted by the grand jury of Cook County for the murder of Andre Davis, the murder of Causia McCall, the attempted murder of Lenious Thomas, the armed robbery of Davis, and the armed robbery of Thomas. These felonies were all committed in a single criminal episode which took place in the early morning hours of December 22, 1978, at a house on the south side of Chicago. The indictment charged that a handgun had been used in the commission of the offenses, and thus the accused were also charged with armed violence.

A motion by the defendant for severance was granted, and he was tried by a jury, which found him guilty on all charges. (Michael Gaines was tried before a separate jury, found guilty except for the robbery of Davis, and was sentenced to imprisonment. His appeal is now pending in the appellate court. In Dickie Gaines' trial the State requested a separate sentencing proceeding, which was heard by the same jury. The jury determined that there were no mitigating factors sufficient to preclude the imposition of the death sentence. On November 2, 1979, the court sentenced the defendant to death on his convictions of murder. The court directed that the sentence be carried out on January 28, 1980, and that the defendant be imprisoned in the penitentiary until that time. An appeal to this court was automatically perfected pursuant to article VI, section 4(b), of the 1970 Illinois Constitution and Rule 603 (73 Ill. 2d R. 603). The trial court stayed the execution pending this appeal.

The circumstances of the crimes were testified to by Thomas, who was called as a witness by the State. The defendant did not testify and offered no evidence at the trial. Michael Gaines was not called as a witness by either party. Except with respect to the charges of armed robbery of Thomas

and Davis no claim is made that the defendant's guilt was not proved beyond a reasonable doubt.

On the afternoon of December 21, 1978, Davis was visiting Thomas at the house where Thomas lived with his parents. Thomas was then 17 years old, and Davis was 24. At about 4 p.m. Davis and Thomas left the house. After visiting and having dinner with a girl friend of Davis, whose name Thomas did not know, the two men went to a tavern in Chicago, where they arrived about midnight. Davis began to shoot pool with an acquaintance named Allen Thompson while Thomas watched the game from a seat at the bar. Davis and Thompson bet money on the outcome of each game, and Thompson testified that he had won $175. In the course of the evening Thomas made the acquaintance of Michael Gaines, whom he had never met before, and at one point Thomas shared with Michael a marijuana cigarette which Thomas had just obtained from Davis.

At about 2 a.m. on December 22, the tavern's closing hour, Thomas, Davis, and Michael Gaines left in a group. As they went out the door they were joined by the defendant. The latter had also been present in the bar, but Thomas, who had never met him before, had had no conversation with him.

The group proceeded to a two-story house where Davis said he wanted to pick up some clothes that belonged to him. Davis' mother, Mrs. Gloria McCall, who was called as a witness for the limited purpose of establishing that Davis had been seen alive shortly before December 22, testified that Davis had been spending his weekends at this house since October. Thomas had never been at the house before.

Davis and Thomas went up to a bedroom at the back of the second floor where they saw a man asleep on a mattress laid on the floor. This man, whom Thomas did not know, was wearing a pair of boots which Davis said were his. After an unsuccessful attempt to awaken the sleeper, Davis removed the boots and then, removing his own shoes as well, put on the boots. Thomas and Davis, who was carrying his shoes in one hand, then walked into an adjacent bedroom where they saw another

man asleep on a couch. This man, who was also unknown to Thomas, was later identified as Causia McCall. Davis walked over to the couch while Thomas remained standing near the door.

The whereabouts of the defendant and his brother up to this point are not made clear by Thomas' testimony, but it appears that they had entered the house along with Davis and Thomas and had also ascended to the second floor. While Thomas and Davis were in the room where McCall lay sleeping, the defendant and Michael came up to the door, and the defendant said, "This is a stick up," producing a pistol. Thomas, who was standing about three or four feet from the defendant, pulled two dollar bills from his pocket, and turned toward the defendant, who began to fire his gun. Thomas was not struck by a bullet, but he threw himself to the floor in a prone position. He heard several shots fired, and then, hearing footsteps which he took to be those of persons leaving the room, he got up and saw Davis lying on the floor. Thomas then ran out of the house and down the street. He encountered a police squad car, and told the officers that there had been a shooting. Thomas guided the officers to the house, where they found two bodies lying on a couch in one upstairs bedroom. In another bedroom at the rear of the house the officers also found a man who was asleep. Upon being awakened, he gave his name as Townshend. Townshend was not called to testify.

After the defendant was apprehended and arrested on January 2, 1979, Thomas identified him in a police lineup. In autopsies performed on McCall and Davis one bullet was recovered from McCall's body and two bullets from Davis'. There was expert testimony that in each case death had resulted from gunshot wounds. Expert testimony was also given that the bullets recovered from the bodies of Davis and McCall could only have been fired by a pistol which had been found by police in an attic in the defendant's house.

At the sentencing hearing the State presented evidence of conduct by the defendant which had not been brought out at the trial as additional aggra-

vating factors. As testified to by the victim, in March 1976 the defendant and two other persons took a purse from a school teacher while she was walking from a mobile classroom to another school building, and knocked her to the ground. The victim was five months pregnant at the time. On May 5, 1977, the defendant was found guilty of robbery, and was sentenced to imprisonment for a term of not less than one and not more than three years. It appears that he was released in June 1978, six months before he committed the crimes involved in the present appeal. There was also testimony by two women friends of the defendant that prior to his apprehension he threatened to kill or injure them if they did not give him money. Two deputy sheriffs assigned to escort the defendant between the lockup and the courtroom testified that on two occasions the defendant had threatened them and that on another occasion they had found concealed on his person a steel pick, two hacksaw blades, and a $10 bill.

The defendant did not take the stand at the penalty hearing, and he called no witnesses to rebut the State's evidence in aggravation or to testify to any mitigating factors.

The defendant puts forward some 18 grounds for reversal. These include charges that section 9--1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 9--1), sometimes referred to herein as "the Act," violates the Constitution of the United States and the Constitution of Illinois in various respects, and alleged errors at the trial and at the sentencing hearing. We begin with a consideration of those contentions directed against the proceedings which led to the defendant's conviction, the first of which is that the jury was improperly selected.

The defendant contends that several veniremen were excused for cause in violation of the criteria specified in Witherspoon v. Illinois (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770. In Witherspoon the Supreme Court, although holding that a potential juror's opposition to the death penalty did not disqualify him, stated:

"We repeat, however, that nothing we say

today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (Emphasis in original.) 391 U.S. 510, 522-23 n.21, 20 L. Ed. 2d 776, 785 n.21, 88 S. Ct. 1770, 1777 n.21.

This delineation of the permissible bases for excluding a juror was adhered to in Boulden v. Holman (1969), 394 U.S. 478, 482, 22 L. Ed. 2d 433, 437-38, 89 S. Ct. 1138, 1140-41, Maxwell v. Bishop (1970), 398 U.S. 262, 265, 26 L. Ed. 2d 221, 224, 90 S. Ct. 1578, 1580-81, Davis v. Georgia (1976), 429 U.S. 122, 123, 50 L. Ed. 2d 339, 341, 97 S. Ct. 399, 399-400, and Adams v. Texas (1980), 448 U.S. 38, 44, 65 L. Ed. 2d 581, 589, 100 S. Ct. 2521, 2525.

The defendant states that of the 31 veniremen excused for cause on the basis of their opposition to the death penalty only 27 stated that they would automatically vote against it, while the answers of the other four jurors were "equivocal." That characterization is incorrect; it results from the defendant's focus on a single question and answer in isolation from the others. We set out the colloquies in their entirety below. Our examination of them satisfies us that the standards of Witherspoon were met.

Juror Mary Wille:

"Q. Mrs. Wille, do you have any scruples, by which I mean strong feelings, by reason of religion or conscience against the death penalty?

A. Yes, I do.

Q. You have scruples against the death penalty, no matter what the particular facts might be?

A. Yes, I would.

Q. Would your scruples about the death penalty, interfere with or affect your ability to determine guilt or innocence in accordance with the evidence and the law?

A. I think so.

Q. If the defendant is found guilty of the charges before the court, would you consider all of the possible penalties available under state law, including the death penalty?

A. I don't think so.

Q. Would your scruples prevent you from considering the death penalty in the present case?

A. Yes, sir.

Q. It would?

A. I think so.

Q. Would you automatically hold against the death penalty, no matter what the facts of this case reveal?

A. I think so.

Q. You would vote against it?

A. Yes.

THE COURT: Thank you. The Court will excuse you."

Juror Kathryn Parker:

"Q. Ms. Parker, do you have any scruples, by which I mean strong feeling by reason of religion, or conscience against the death penalty?

A. Yes, I do.

Q. Do you have these scruples against the death penalty, no matter what the particular facts might be?

A. Yes.

Q. Would your scruples about the death penalty interfere or affect your ability to determine the guilt or innocence in accordance with the evidence in the law?

A. I believe so.

Q. If the defendant is found guilty of the charges before the court, could you consider all of the possible penalties available under the state law, including the

death penalty?

A. No.

Q. Would your scruples prevent you from considering the death penalty in the appropriate case?

A. Yes.

Q. Would you automatically vote against it; against the death penalty, no matter what the facts of this case reveal?

A. Possibly.

THE COURT: Thank You.

The court will excuse you."

Juror Mable Gibbs:

"Q. Mrs. Gibbs, do you have any scruples, by which I mean strong feelings of religion or conscience against the death penalty?

A. I do.

Q. Do you have these scruples against the death penalty no matter what the particular facts of this case might be?

A. Yes.

Q. Would your scruples about the death penalty interfere with or affect your ability to determine guilt or innocence in accordance with the evidence and the law?

A. No.

Q. It would not interfere with your scruples?

A. I don't think they would.

Q. If the defendant is found guilty of the charges against him before this court, would you consider all of the possible penalties available under the state law, including the death penalty?

A. That's kind of hard, but I don't think so.

Q. Would your scruples prevent you from considering the death penalty in the appropriate case?

A. No.

Q. Would your scruples prevent you from considering the death penalty in the appropriate case?

A. Yes.

Q. Would you automatically vote against

the death penalty, no matter what the facts of this case revealed?

A. I think I would.

THE COURT: I will excuse you, Mrs. Gibbs."

Juror Alma Smith:

"Q. Mrs. Smith, do you have any scruples by which I mean strong feelings by reason of religion or conscience against the death penalty?

A. Very much so.

Q. Do you have any scruples against the death penalty no matter what the particular facts might be?

A. Yes.

Q. Would your scruples about the death penalty interfere with your ability to determine the guilt or innocence in accordance with the law?

A. I don't think so.

Q. It would not interfere with it?

A. No.

Q. If the defendant were found guilty of the charge before the court, could you consider all of the possible penalties available under state law including the death penalty?

A. No.

Q. Would your scruples prevent you fron considering the death penalty in the appropriate case?

A. I would say so.

Q. Would you be able to consider the death penalty?

A. Oh, no.

Q. Would you automatically vote against the death penalty no matter what the facts of the case would be?

A. I think so."

The defendant's objection to the disqualification of Ms. Wille is that when asked whether she would automatically vote against the death penalty (the seventh in the series of questions propounded to her in the excerpt above), Ms. Wille said "I think so." When the same inquiry was repeated,

however, Ms. Wille said "Yes." The objection to Ms. Parker is that when asked the same question (the seventh question propounded), she replied "possibly." Shortly before, however, she had stated that she could not consider the death penalty if the defendant were found guilty. Ms. Gibbs' answer to the same question (the eighth of the questions propounded) was, "I think I would," but Ms. Gibbs had also stated that she could not consider imposing the death penalty on the defendant. For the same reason Ms. Smith's response of "I think so" to the same question (the seventh question propounded) cannot be taken as expressing some doubt or reservation.

We think it is appropriate to point out that the distinction drawn in Witherspoon between a venireman's general opposition to the death penalty and his unwillingness to vote for its imposition is a sophisticated one which a prospective juror may not readily grasp. While it is the duty of the trial judge to propound the key questions in a form which will be understood and with enough specificity to admit of an unambiguous response, we do not read Witherspoon as prescribing a set catechism, or as requiring a venireman to express himself with meticulous preciseness.

The defendant does not contend that the questions initially propounded by the trial judge were defective or insufficient. His position is rather that the trial judge should have propounded additional questions to "clarify" the responses given by the four veniremen. But what these further questions should have been the defendant does not say, nor did he suggest any during the voir dire, as he was entitled to do under Rule 234 (73 Ill. 2d R. 234). An answer of "I think I do" rather than "yes," standing in isolation, may be inadequate. (See Maxwell v. Bishop (1970), 398 U.S. 262, 264, 26 L. Ed. 2d 221, 223-24, 90 S. Ct. 1578, 1580.) To ask a venireman if he would consider the death penalty "in the appropriate case" is not a satisfactory form of question, and an answer to that question standing alone may also be insufficient. We must, however, consider the responses of the veniremen not in isolation but as

a whole. But in considering any claimed inconsistencies in the answers given by a venireman, we of course recognize the superior position of the trial judge to ascertain the meaning which the venireman intends to convey.

The State also contends that if the disqualification of the four veniremen should be deemed erroneous, the error was not prejudicial since when the last of them was excused the State had more than four of its allotted peremptory challenges remaining. We do not need to consider that argument, and we express no opinion as to its merits.

The defendant makes the further objection that among those jurors who stated that they would automatically vote against the death penalty six also stated that their opposition to the death penalty would not affect their determination of guilt. The defendant urges that those six persons should not have been excused. Witherspoon, of course, states that a juror's automatic opposition to the death penalty or his inability to fairly pass on the issue of guilt constitutes a basis for excluding a juror. The defendant recognizes that this is so, but points out that in Witherspoon the jury determined guilt and punishment at the same time, whereas Illinois now has a bifurcated proceeding. From this he argues that a juror who states that he would be able to decide the issue of guilt impartially should be permitted to pass on that issue notwithstanding his inability to vote for the death penalty.

The defendant's attempt to distinguish Witherspoon on this basis is defeated by the Supreme Court's decision in Adams v. Texas, 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521. That case involved a bifurcated proceeding similar to that now employed in Illinois, yet the court observed that Witherspoon nevertheless remained applicable. See 448 U.S. 38, 45-46, 65 L. Ed. 2d 581, 589-90, 100 S. Ct. 2521, 2526-27.

As the defendant admits, his theory would require that a new jury be impaneled for the sentencing hearing. The same proposal was made and rejected in People v. Lewis (Nov. 13, 1981),

No. 52338, slip op. at 9, where we pointed out that it was questionable whether there was power to adopt such a procedure under section 9--1(d), and that its adoption would present potential constitutional problems. In Lewis we also considered and rejected a related argument, which is also made here, that a jury composed entirely of persons who are not opposed to the death penalty is "conviction-prone." No further discussion of these contentions is required.

The defendant's remaining objection to the jury goes to its racial composition. The defendant, who is black, states that the jury contained no black persons, and that that circumstance resulted from the prosecution's having used some of its peremptory challenges to exclude veniremen who were black but were not subject to removal for cause. The defendant concedes that under Swain v. Alabama (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, the motives of the prosecution in exercising peremptory challenges are not subject to examination absent a showing that blacks have been systematically prevented from serving on particular juries or from jury service in the county or State, a showing not attempted here. (See 380 U.S. 202, 221-23, 13 L. Ed. 2d 759, 773-74, 85 S. Ct. 824, 836-37.) A similar position has been taken by this court in People v. Harris (1959), 17 Ill. 2d 446, 450-51, cert. denied (1960), 362 U.S. 928, 4 L. Ed. 2d 747, 80 S. Ct. 755; cf. People v. Powell (1973), 53 Ill. 2d 465, 477-78; People v. King (1973), 54 Ill. 2d 291, 298.

The defendant cites People v. Wheeler (1978), 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890, and Commonwealth v. Soares (1979), ___ Mass. ___, 387 N.E.2d 499, cert. denied (1979), 444 U.S. 881, 62 L. Ed. 2d 110, 100 S. Ct. 170, in which the supreme courts of California and of Massachusetts rejected Swain, and he urges that this court should follow their lead. As had been the case in Swain, the defendants in Wheeler and in Soares were black, and the victims were white. In Wheeler, the prosecution peremptorily challenged all the black veniremen, in Soares all but one. In each case the conviction was reversed, the court

holding that when a defendant has made a prima facie case that the prosecution has excluded veniremen on the basis of their race, the prosecution then has the burden to show that its exclusion of the jurors was based on other grounds.

The question whether this court should depart from the principle adopted by the Supreme Court in Swain and overrule its decision in Harris is not presented in this case, however. As the State points out, the defendant did not raise this issue until all the jurors had been sworn. Moreover, he failed to make a record which would show that the veniremen who were peremptorily challenged by the State were black. Such a showing is required even under Wheeler and Soares. See People v. Wheeler (1978), 22 Cal. 3d 258, 280, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905; Commonwealth v. Soares (1979), ___ Mass. ___, ___, 387 N.E.2d 499, 517.

The defendant objects to the admission into evidence of testimony by Robert Dwyer, an investigator for the Chicago police department, of two telephone conversations made by the defendant which Dwyer overheard on an extension telephone. One of these conversations was between the defendant and his mother, Rebecca Gaines, and the other was between the defendant and his brother Michael. The defendant contends that Dwyer's listening to the conversations was an act of eavesdropping made unlawful by section 14--2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 14--2), which provides:

> "A person commits eavesdropping when he:
>
> (a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party to such conversation and in accordance with Article 108A of the 'Code of Criminal Procedure of 1963', approved August 14, 1963, as amended; ***."

Since section 14--5 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 14--5) provides that evidence obtained in violation of section 14--2 is inadmissible, the defendant con-

tends that the trial judge erred in denying his motion to exclude this portion of officer Dwyer's testimony.

The term "eavesdropping device" is defined by section 14--1(a) of the Criminal Code of 1961:

> "An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing." Ill. Rev. Stat. 1979, ch. 38, par. 14--1(a).

Officer Dwyer testified that on December 23, before the defendant had been apprehended and arrested, he called at the home of the defendant's mother, where both the defendant and his brother resided. Both Mrs. Gaines and Michael were present during this visit, as were some other police officers assigned to the investigation. Shortly after Dwyer's arrival, the telephone rang. Michael answered it, and told his mother that the caller was the defendant, and that he wished to speak to her. As Mrs. Gaines approached the telephone, Dwyer asked her if he might listen to the conversation on an extension. She gave Dwyer permission to do so and directed him to an extension phone located in an adjacent room, where Dwyer picked up the instrument.

As Dwyer was about to testify to the conversation he had overheard between the defendant and Mrs. Gaines, defendant's counsel objected to the admission of the testimony and moved for a mistrial. The trial court overruled the objection and denied the motion. Dwyer then testified that the defendant made the following remarks:

> "What the f--- are you trying to do to me? Why the f--- isn't the family helping me? I know you're helping the police. What the f--- is wrong with Michael? That's all you give a shit about is Michael. Why aren't you getting me the money."

The defendant then asked to speak to Michael, and Dwyer remained on the extension phone. Over

the defendant's continuing objection, Dwyer then reported that after the defendant had begun by saying to Michael, "Boy you ain't doing your part," the following interchange took place:

> "Michael responded, 'Ain't no boy here.' He [Dickey] said, 'man, you just covering your ass. Don't you know they can give us the chair for what we done? You ain't even doing your part, man. You ain't even put the gun where you was supposed to.' And Michael said, 'What gun, man? What gun?' Dickey responded, 'Nigger, you crazy Nigger, you know what gun. You ain't even doing your part. I'm going to knock you, man. You're just covering your ass.' Michael then said, 'I'll put it there now, man. I'll put the gun there now.' Dickey said, 'No, you won't man. F--- you. I'll get another gun. They ain't going to take me alive. I'll get another gun. I'll shoot it out with the police."

After the conversation ended, Dwyer testified, he asked one of the other police officers present, Patrick Fleming, "to accompany Michael to get the weapon that he had hidden in the attic." Fleming returned carrying a gun. This gun was admitted into evidence at the trial, and other testimony, whose accuracy is not challenged, showed that the shots that killed the victims Davis and McCall had been fired from it.

The defendant's brief, as is that of the State, is confined to the discussion of whether a telephone extension is an eavesdropping device. Before addressing that question, it is important to consider the basis of the defendant's claim that the admission of Dwyer's testimony was prejudicial and thus requires reversal of his conviction. The defendant first raised his objection in a pretrial motion to suppress. It appears from colloquies between the trial judge and the defendant's counsel that the court had denied the motion prior to trial.

While the two telephone conversations include comments by the defendant which might amount to admissions of complicity, at the time of these

conversations the police had already received information pointing to the defendant from interviews with the victim Thomas and with friends of the defendant whom the latter contacted following the crime. The defendant thus cannot complain that his remarks were incriminatory, and that was not the basis of his objection. Both his brief and statements made to the trial court by his counsel show that his objection is based on the assumption that the eavesdropping of his conversation with his brother enabled the police to locate and to recover the murder weapon.

This assumption is not supported by the evidence. Statements regarding the location of the gun were also made by Michael Gaines during the telephone conversation, and those statements could have been heard by the police officers who were present when they were made. In addition, Officer Fleming, who was also called as a witness, testified that he had had a face-to-face conversation with Michael, after which Michael took him up to the second floor, where Fleming recovered the gun.

The claim by the defendant that the admission of the gun was prejudicial, moreover, has been abandoned on this appeal. At the trial, the defendant did object to the admission of the gun, presumably on the theory that section 14--5 of the Criminal Code of 1961 bars the admission of other evidence obtained through illegal eavesdropping (see People v. Maslowski (1966), 34 Ill. 2d 456, 464-65), but he does not now assert that its admission was error, and he does not contend that his conviction of murder was not proved beyond a reasonable doubt.

The monitoring of the defendant's telephone conversation, in any event, was not proscribed by section 14--2(a), for an extension telephone is not an eavesdropping device as that term is defined by section 14--1(a). People v. Dixon (1961), 22 Ill. 2d 513, so held with respect to the statutory antecedent of section 14--1(a) (Ill. Rev. Stat. 1959, ch. 38, par. 206.1), and that holding is applicable as well to the present section.

The defendant seeks to distinguish Dixon on the ground that the provision involved there defined an eavesdropping device as "any device employing electricity" (22 Ill. 2d 513, 516), a qualification omitted from section 14--1(a). The decision in Dixon, of course, could not have rested on the proposition that an extension telephone is not a device employing electricity. The basis of the decision was rather that the statute is directed against the use of devices other than the telephone itself when the latter has not been functionally altered.

We also do not agree with the defendant's contention that Dixon was overruled by People v. Kurth (1966), 34 Ill. 2d 387. In Kurth an electronic device to record a telephone conversation was used. The decision turned on the holding that even though the device had been installed by one of the parties to the conversation, another party was not precluded from having the conversation excluded from evidence. The court overruled Dixon only with respect to that issue. See 34 Ill. 2d 387, 395.

The significance of a participant's lack of consent to the monitoring or recording of a telephone conversation has varied with the changes which the legislature has made from time to time in section 14-2. (See Ill. Ann. Stat., ch. 38, par. 14--2, Historical Note (Smith-Hurd 1979); People v. Kezerian (1979), 77 Ill. 2d 121, 126; People v. Richardson (1975), 60 Ill. 2d 189). But the question of consent becomes material only if an eavesdropping device has been employed.

The defendant refers us to language in United States v. Harpel (10th Cir. 1974), 493 F.2d 346, 351-52, that an extension telephone is an eavesdropping device when it is used surreptitiously, as it was here. Harpel involved a conviction for violation of a Federal statute forbidding the interception and disclosure of wire communications (18 U.S.C. §§ 2510 to 2520 (1970)). Section 2510(5)(a)(1) of the Federal act, which defines those devices whose use constitutes unlawful interception, is structured so differently from section 14--1(a) that the construction given to it

in Harpel would not further the defendant's contention that People v. Dixon should be overruled. We also cannot accept his undocumented assertion that the Federal act somehow preempts State regulation of wire communications claimed to be less stringent. To the extent that the defendant is maintaining that the Illinois statute violates the ban against unreasonable searches and seizures found in either the Federal or the Illinois constitution, that claim was carefully considered and was rejected in People v. Richardson (1975), 60 Ill. 2d 189. See also People v. Kezerian (1979), 77 Ill. 2d 121, 127-28.

The construction of section 14--1(a) urged by the defendant, whereby the surreptitious monitoring of the statements made by the defendant during his telephone conversation would constitute illegal eavesdropping, would, to be sure, give greater protection to the person who is the subject of eavesdropping. What the defendant overlooks is that section 14--1(a) excludes evidence acquired through eavesdropping only if the acquisition was a criminal offense (People v. Kurth (1966), 34 Ill. 2d 387, 396 (concurring opinion by Justice Schaefer)). To protect a person who uses an extension phone for a purpose other than to obtain evidence of criminal conduct would require a major recasting of section 14--1(a). This the General Assembly has not done, even though its frequent amendments of section 14--2 display its awareness of the problem inherent in the regulation of telephone eavesdropping.

The defendant objects to the admission into evidence of subsequent testimony of Officer Dwyer to a conversation with the defendant after the identification of the latter by Thomas at a police lineup.

Dwyer testified that after giving the defendant his Miranda warnings, he told the latter that he had just been identified as the person who had killed Davis and McCall, and also told the defendant "he had been implicated by his own brother as the person who killed these two ***." At this point the defendant objected and moved for a mistrial. The basis for the objection and the motion

was that testimony as to statements made to the witness by Michael Gaines would be hearsay and would deny the defendant his right of confrontation under Bruton v. United States (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. The court overruled the objection and denied the motion. Dwyer then went on to testify, "I also called to his attention that we did in fact have the murder weapon in custody and that his brother had given us an accounting of the whole sequence of events." The defendant renewed his objection and his motion, and the court made the same ruling as before.

In a conference held outside the presence of the jury the court stated that if Dwyer's further testimony should be that the defendant had orally admitted the statements allegedly made by his brother, Dwyer's testimony would be admissible. The court said:

> "At this point I am going to allow them [the prosecution] to continue and get to the point. Then if you still have an objection after you hear the answer, then I'll have to rule again as to whether I am going to direct the jury, sustain your objection and direct the jury to disregard."

Dwyer next testified that he had told the defendant of having listened in to the telephone conversation with Michael Gaines on December 23, in which, Dwyer testified, the defendant and his brother "discussed certain elements of this offense," to which the defendant replied that he knew that the police were listening in. The defendant's counsel did not renew his objection at this juncture, and he did not cross-examine the witness.

We need not decide whether the admission of this part of Dwyer's testimony violated the Bruton rule, however, since the uncontroverted eyewitness testimony of Thomas was sufficient to sustain the defendant's conviction of murder, and the admission of Dwyer's testimony would be harmless error. Brown v. United States (1973), 411 U.S. 223, 36 L. Ed. 2d 208, 93 S. Ct. 1565; Schneble v. Florida (1972), 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct.

1056; Harrington v. California (1969), 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726.

Testimony was given at the trial that the defendant had escaped from the Cook County jail where he was being confined awaiting trial. He was recaptured in a few hours. The defendant does not deny that the jury could properly consider his escape as evidence tending to show guilt (see People v. Gambino (1957), 12 Ill. 2d 29, 32; People v. Harper (1967), 36 Ill. 2d 398, 403-04), but he complains that the court failed to instruct the jury "how it should use the evidence of escape." This omission, according to the defendant, improperly permitted the jury to conclude that the fact of escape by itself overcame the presumption of innocence, on which the jury was correctly instructed.

Chapter 3.00 of the Illinois Pattern Jury Instructions, Criminal (1968), contains no recommended instruction to define the evidentiary significance of escape, and in section 3.03, which relates to the analogous situation of flight from the scene of a crime, the committee recommended that no instruction be given on this subject. The defendant, moreover, does not state what instruction should have been given, and he tendered none at the trial. Capital cases, like other criminal proceedings, are subject to the general rule that the court is under no obligation to give instructions not tendered by counsel. People v. Carlson (1980), 79 Ill. 2d 564, 584.

The remaining contention made by the defendant regarding his trial is that he was not proved guilty beyond a reasonable doubt of the charges of armed robbery of Thomas and Davis. As to Thomas, his testimony was that when the defendant pointed a pistol at him and said, "This is a stick-up," Thomas pulled two dollar bills out of his pocket and dropped them to the floor. Later, when he left the room, he found only one of the bills. The defendant suggests that the other bill might have been lying somewhere on the floor. The defendant's position is thus that no robbery takes place unless the accused takes physical possession of the property which he has forced the defendant to

surrender.

The defendant's position misinterprets section 18--1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 18--1(a)), which defines robbery as follows:

> "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force."

In People v. Smith (1980), 78 Ill. 2d 298, 303, we stated, "The offense of robbery is complete when force or threat of force causes the victim to part with possession or custody of property against his will." To constitute the offense of robbery it is not necessary that the defendant have picked up and carried off any of the bills.

In his opening brief the defendant complained that proof was also lacking of the armed robbery of McCall, to which the State responded that that offense had not been charged. The defendant then was given leave to amend his brief to allege that there had been no proof of the armed robbery of Davis, to which the State responds that a robbery of Davis did occur, since the robbery of Thomas took place while Davis was present. The State's contention also misreads section 18--1. The property taken must have been taken from the victim of the robbery (People v. Braverman (1930), 340 Ill. 525, 531; People v. Smith (1980), 78 Ill. 2d 298, 302-05). There was no evidence whatever that the defendant took anything of value from Davis. We therefore agree that the conviction of the defendant of the armed robbery of Davis must be reversed. As will appear from our discussion of the defendant's challenges to the death sentence imposed upon him, the reversal of that judgment of conviction does not invalidate the sentence.

We hold, therefore, that with the exception of the charge of armed robbery of Davis, the conviction of the defendant is affirmed. We turn next to the defendant's contentions that the judgment sentencing him to death must be vacated, considering first his claims that the Act violates provisions of the Federal and State constitutions, some of

which have already been disposed of by prior decisions of this court.

The defendant asserts that the power given the State's Attorney to determine whether he will seek the death penalty in a particular case improperly delegates legislative authority to the State's Attorney of each county, and that it confers upon the executive branch of the government a power which belongs to the judiciary in violation of article II, section 1, of the Constitution of Illinois (Ill. Const. 1970, art. II, § 1). These contentions were fully considered and rejected in People ex rel. Carey v. Cousins (1979), 77 Ill. 2d 531, cert. denied (1980), 445 U.S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 1603. The decision in Cousins was followed in People v. Brownell (1980), 79 Ill. 2d 508, 527-28, appeal dismissed (1980), __ U.S. ___, 66 L. Ed. 2d 14, 101 S. Ct. 59, and in People v. Lewis (Nov. 13, 1981), No. 52338, slip op. at 9. The same is true of the related contention that the Act fails to provide sufficiently specific standards to guide the various State's Attorneys. The settled course of decision by this court renders further discussion of these issues superfluous.

Objection is also made to the Act's omission of a requirement that the State give notice to a defendant before trial of the State's intention to seek the death penalty. Such an omission, it is said, deprives a defendant of the effective assistance of counsel, because it impairs his ability to decide whether to bargain for a negotiated plea and whether to demand or to waive a jury trial.

No claim is made and the record does not show that the defendant was disabled in any way by ignorance of the prosecutor's intention to request a sentencing hearing if he were convicted of murder. On the contrary, before the process of selecting a jury had even begun, the defendant's counsel told the court, "I suppose we previously discussed this, the State, I gather, is intending to seek the death penalty." The case is thus quite unlike People v. Walker (1981), 84 Ill. 2d 512, where the record showed that the accused was

misled into believing that the State would not do so.

Since the indictments here charged the commission of multiple murders and the commission of murder in the course of another felony, the defendant was informed that he could, potentially, be sentenced to death. (Cf. People v. Brownell (1980), 79 Ill. 2d 508, 525.) To require that in all cases the State must give pretrial notice of its intention to seek the death penalty would necessarily defeat the prosecutor's informed exercise of the discretion to which we held he is entitled in People ex rel. Carey v. Cousins (1979), 77 Ill. 2d 531, 543. The defendant himself concedes that that is so, for in his reply brief he urges simply that Cousins be overruled.

The defendant objects to the sentencing proceedings on several grounds: the admission of testimony by two deputy sheriffs concerning his conduct outside the courtroom; the failure to present a presentence report; the denial of his motion for leave to address the jury; the jury's failure to find that there was no possibility of his rehabilitation; its failure to specify which aggravating factor it relied upon; and the refusal of the judge to review and set aside the verdict. Lastly the defendant contends that his execution is barred by the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1979, ch. 38, par. 122--1 et seq.). We take up these objections in the same order.

At the sentencing hearing the prosecution called as witnesses two deputy sheriffs who had been assigned to the courtroom in which the trial was held. These witnesses, whose duties included keeping order in the courtroom and transporting prisoners between the lockup and the courtroom, testified that the defendant had engaged in acts of misconduct in their presence on three occasions described earlier in this opinion. Each witness was asked on cross-examination whether he had ever taken an oath as a deputy bailiff for the jury, and stated that he had. No further questions were put to these witnesses. The defendant's motion to strike their testimony was denied. The defendant

contends that the court's ruling was erroneous under Turner v. Louisiana (1965), 379 U.S. 466, 13 L. Ed. 2d 424, 85 S. Ct. 546.

In Turner the defendant was found guilty by a jury on a charge of murder, and was sentenced to death. The principal witnesses for the prosecution were two deputy sheriffs who had been involved in the investigation of the crime and the arrest of the defendant. They testified to oral admissions and a written confession of the defendant, who did not himself take the stand. The jury was sequestered during the trial. It was placed in the charge of the two deputies as bailiffs. In the course of a hearing held on a motion by the defendant for a mistrial the witnesses testified to the particulars of their contacts with the jury which showed, the Supreme Court found, that the witnesses had "freely mingled and conversed with the jurors in and out of the courthouse during the trial." (379 U.S. 466, 468, 13 L. Ed. 2d 424, 426, 85 S. Ct. 546, 547.) The court held that despite the lack of any evidence that either deputy had ever spoken to a juror about the case, the conviction of the defendant violated the fourteenth amendment, stating:

> "[E]ven if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution. ***.
>
> It would have undermined the basic guarantees of trial by jury to permit this kind of an association between the jurors and two key prosecution witnesses who were not deputy sheriffs. But the role that Simmons and Rispone [the deputy sheriffs] played as deputies made the association even more prejudicial. For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial. ***." (Emphasis in original.) 379

U.S. 466, 473-74, 13 L. Ed. 2d 424, 429-30, 85 S. Ct. 546, 550.

The present case differs from Turner in several respects: The witnesses did not participate in the investigation of the crime or the apprehension and arrest of the defendant. They did not testify at the trial, and their testimony accordingly played no role in the jury's verdict of guilty. Their testimony at the sentencing hearing related only to the occurrence of an additional aggravating factor. Without it the defendant could still have been sentenced to death in the absence of mitigating factors sufficient to preclude the imposition of the death sentence. Most significantly, there was no testimony, and the defendant did not seek to elicit any from the witnesses, concerning the character or extent of their contacts with the jurors. Thus there was no showing that there existed a "close and continual association" between them, and hence no basis to infer the existence of a relationship which would "foster the jurors' confidence" in the witnesses. See Turner v. Louisiana (1965), 379 U.S. 466, 468, 474, 13 L. Ed. 2d 424, 426, 430, 85 S. Ct. 546, 547, 550.

Although the record is silent, the State asserts that the two deputies were transferred to a different courtroom following the last of the three episodes to which they testified, which took place on October 10, the last day of the trial and only five days before the sentencing hearing began.

The defendant points out that the termination of the deputies' role as bailiffs after the events to which they testified would not necessarily eliminate the problem which concerned the court in Turner. We may concede that if a "close and continual association" already existed between the witnesses and the jurors, the removal of the former might not dissipate the prejudicial effect of their testimony. We do not agree, however, with the remedy which the defendant proposes, that "deputies involved with the defendant in the lock-up, jail or whatever should be prevented from having contact with the courtroom or other [sic]

jurors. When the defendant enters the courtroom different deputies would be used."

Unless knowledge of criminal acts by a defendant committed in the presence of his custodians, including attempts to escape, is to be denied the sentencing jury, those deputy sheriffs assigned to escort a defendant between the courtroom and the lockup or the county jail could never serve as bailiffs for the jury. To require such a practice could impose a substantial burden upon units of local government, particularly those of less populated counties. For the reasons given above, we do not consider that the testimony complained of invalidated the death sentence imposed in this case. Cf. People v. Rettig (1972), 50 Ill. 2d 317, cert. denied (1972), 409 U.S. 895, 34 L. Ed. 2d 152, 93 S. Ct. 186.

The defendant objects that no presentence report was made, notwithstanding section 5--3--1 of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 1005--3--1), which provides: "A defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court."

Although murder is a felony, it does not follow that section 5--3--1 was applicable here. Chapter V of the Unified Code of Corrections, of which this section forms a part, deals with sentences other than sentences of death, such as sentences of imprisonment, periodic imprisonment, probation, and conditional discharge. We held in People v. Youngbey (1980), 82 Ill. 2d 556, that section 5--3--1, where applicable, cannot be waived by the defendant, since one of its purposes is to acquaint the sentencing judge with the defendant's criminal history, thus assisting the judge in choosing among the various dispositions which are authorized by section 5--5--3 of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 1005--5--3).

In the present case no sentencing options were available to the court, for it was required to sentence the defendant to death after the jury returned a verdict that there were no mitigating

factors sufficient to preclude that sentence. (People v. Lewis (Nov. 13, 1981), No. 52338, slip op. at 12-13.) Section 5--3--1 of the Code of Corrections thus could have no application here. We express no opinion whether section 5--3--1 would or would not apply in a case where the jury does not return such a verdict, with the result that the court must impose a sentence of imprisonment.

The defendant argues that if the jury is given the ultimate sentencing power, then a presentence report must be prepared and presented to the jury. The jury must of course consider those mitigating factors enumerated in section 9--1(c) and any information bearing on other mitigating factors which is brought to its attention. Such information could include items which fall within the categories enumerated in section 5--3--2 of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 1005--3--2). The defendant fails to show in what way the preparation and presentation of a formal presentence report to the jury would provide it with additional relevant information for its consideration.

The defendant also contends that he was denied what he characterizes as his constitutional right of allocution. The nature of the defendant's claim appears from the motion which he made orally just before the beginning of the sentencing hearing. In that motion he requested that he be allowed "to make a statement to the jury, not under oath, and not subject to cross examination." The State objected, and the court denied the motion.

After the State had rested its case in chief, which has been previously described, the defendant renewed his motion, which was again denied. The defendant put in no evidence and rested his case. After the jury had returned its verdict, and after motions by the defendant in arrest of judgment, for judgment of acquittal notwithstanding the verdict, and for new trial had been denied, the court said to the defendant, "Mr. Gaines, would you like to say anything?" The defendant answered "No." Sentence was then pronounced. We do not consider that the trial court's denial of the defendant's

motion constituted prejudicial error.

Allocution at common law referred to the inquiry which the court made of the defendant, upon return of a guilty verdict in a capital case, whether the defendant had any reason to offer why judgment should not be entered against him. The purpose of the allocution was not to afford an opportunity to present mitigating evidence or to plead for leniency but rather to disclose certain special circumstances, such as benefit of clergy, which precluded execution of the sentence. (See Barrett, Allocution, 9 Mo. L. Rev. 115 (1944); Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821, 832-33 (1968)). At common law this opportunity for the defendant to make a personal statement was of particular importance, since he was not entitled to be represented by counsel, and was not considered competent to testify as a witness in his own behalf. See McGautha v. California (1971), 402 U.S. 183, 217, 28 L. Ed. 2d 711, 732, 91 S. Ct. 1454, 1472; Green v. United States (1961), 365 U.S. 301, 304, 5 L. Ed. 2d 670, 673, 81 S. Ct. 653, 655.

The practice of allocution has been followed to varying degrees in many American jurisdictions, although in some the practice is regarded as having no more than a ceremonial character because of the safeguards which modern criminal procedure now provides to the defendant. (See Annot., 96 A.L.R.2d 1292 (1964)). In Illinois prior to the enactment in 1972 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1001--1--1 et seq.), there appears to have been no statute relating to allocution. In Gannon v. People (1889), 127 Ill. 507, 521, this court held: "[W]hile it is a better practice to call upon the defendant to say why he should not be sentenced, yet the omission to do so is no ground for reversal in any case." That view of the matter was adhered to in later decisions. See, e.g., Lamb v. People (1905), 219 Ill. 399; People v. Shaw (1971), 49 Ill. 2d 309, 313.

As originally enacted, section 5--4--1(a) of the Unified Code of Corrections (Ill. Rev. Stat.

1973, ch. 38, par. 1005--4--1(a)), which specifies the sentencing procedures to be followed in criminal proceedings generally, provided:

> "After a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court shall:
>
> (1) consider the evidence, if any, received upon the trial;
>
> (2) consider any presentence reports;
>
> (3) consider evidence and information offered by the parties in aggravation and mitigation;
>
> (4) hear arguments as to sentencing alternatives; and
>
> (5) afford the defendant the opportunity to make a statement in his own behalf."

Following the enactment in 1977 of the amendatory legislation to section 9--1 of the Criminal Code of 1961 which established the present bifurcated trial for aggravated murder, subsection 5--4--1(a) of the Unified Code of Corrections was amended by adding at its beginning the exclusionary phrase, "Except when the death penalty is sought under hearing procedures otherwise specified." (Pub. Act 80--1099; Pub. Act 80--1387.) This legislation had become effective when the defendant committed the crimes of which he was here convicted, and therefore no right to be given an opportunity to make a statement in his own behalf was conferred on the defendant by virtue of section 5--4--1(a).

So far as section 9--1 of the Criminal Code of 1961 is concerned, subsection (3) of course allows the defendant to testify at the sentencing hearing, but it does not require in terms that the defendant be given an opportunity to speak other than as a witness. A defendant in a criminal proceeding who testifies in his own behalf is subject to reasonable cross-examination (People v. Miller (1930), 342 Ill. 244, 252; McGautha v. California (1971), 402 U.S. 183, 215, 28 L. Ed. 2d 711, 731, 91 S. Ct. 1454, 1471), and no reason appears why an exception to that principle should be read into section 9--1(e) by implication.

The defendant cites no decision of this court supporting his claim that he had a constitutional right to address the jury, but relies solely on the decision of the Supreme Court in Green v. United States (1961), 365 U.S. 301, 5 L. Ed. 2d 670, 81 S. Ct. 653. That case involved the application of Rule 32 of the Federal Rules of Criminal Procedure to a conviction for a Federal crime. Rule 32(a) provided in pertinent part:

> "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

In Green, at the close of the proceedings leading to the defendant's conviction, which took place in 1952, the Federal district judge asked, "Did you want to say something?" (365 U.S. 301, 304, 5 L. Ed. 2d 670, 673, 81 S. Ct. 653, 655), and the defendant's counsel then responded by mentioning various circumstances of a mitigating character. The judge then pronounced sentence. Seven years later the defendant filed a petition to vacate his sentence under Rule 35 of the Federal Rules of Criminal Procedure, claiming that the sentence was rendered illegal by the district judge's failure to ask the defendant whether he had anything to say on his own behalf.

The Supreme Court affirmed the denial of the petition on the ground that the judge's initial inquiry might have been directed to the defendant rather than his counsel. The court went on to make the following statement, however:

> "Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." 365 U.S. 301, 305, 5 L. Ed. 2d 670, 674, 81 S. Ct. 653, 655.

Rule 32(a) was amended in 1966 to incorporate the suggestion made in Green (18 U.S.C. Rule 32, Notes of Advisory Committee on Rules (1970)).

Green must be read in the light of Hill v. United States (1962), 368 U.S. 424, 7 L. Ed. 2d 417, 82 S. Ct. 468, however. In Hill the district judge had imposed sentence without making the inquiry of the defendant. No appeal was taken from the conviction, but the defendant subsequently made a collateral attack on his conviction by a petition filed under section 2255 of Title 28 of the United States Code (1958), which provides for vacation of a sentence imposed by a Federal court where "the sentence was imposed in violation of the Constitution or laws of the United States." The Supreme Court, noting that the relief available under section 2255 was no more extensive than that which had been available by habeas corpus, stated:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.
>
> * * *
>
> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to

comply with the formal requirements of the Rule." 368 U.S. 424, 428-29, 7 L. Ed. 2d 417, 421-22, 82 S. Ct. 468, 471-72.

In McGautha v. California (1971), 402 U.S. 183, 219 n.22, 28 L. Ed. 2d 711, 733 n.22, 91 S. Ct. 1454, 1473 n.22, the Supreme Court noted that the question whether an affirmative refusal to let a defendant speak was unconstitutional was still open, and the defendant here refers us to no later decision in which the Supreme Court has addressed that question.

It is not clear, moreover, that the question is even presented in this case, for the defendant was ultimately afforded an opportunity to speak but declined to exercise it. The defendant says that that opportunity came too late to be meaningful since the jury had already returned its sentencing verdict, and since, as we have held in People v. Lewis (Nov. 13, 1981), No. 52338, slip op. at 10, the trial judge had no power to disregard it. It remains true, nevertheless, that the defendant's negative response to the court's inquiry and his failure to offer any evidence at the sentencing hearing indicate that the defendant would not "have had anything at all to say" had he been allowed to address the jury. As in Hill, no claim is made to the contrary. Cf. Gordon v. United States (5th Cir. 1971), 438 F.2d 858, 880, cert. denied (1971), 404 U.S. 828, 30 L. Ed. 2d 56, 92 S. Ct. 139.

In addition to his claim that the denial of his request to address the jury deprived him of due process, the defendant contends that the equal protection clause was also violated, since in cases where the prosecution does not seek the death penalty a defendant is given the opportunity to make a statement by virtue of section 5--4--1(a)(5) of the Unified Code of Corrections. In support of this contention the defendant cites Griffin v. Illinois (1956), 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585. In Griffin the court held that if a transcript of proceedings was necessary in order to obtain full appellate review of a conviction, the State must supply one free to a criminal defendant who was indigent. While the

court noted that the Illinois statutes did provide for a free transcript to be furnished to defendants who had been sentenced to death, it was not the differentiation in treatment as between capital and noncapital defendants which prompted the holding of unconstitutionality, but rather the differentiation between defendants who were indigent and those who were not.

In People ex rel. Tucker v. Kotsos (1977), 68 Ill. 2d 88, this court held that to deny bail to persons incarcerated pending the outcome of proceedings for revocation of parole while making bail available to persons incarcerated pending the outcome of proceedings to revoke probation did not offend the equal protection clause. In so holding the court took the position that the normal deference to legislative classifications should not be departed from unless the classification either impinged on some right deemed fundamental or was directed against a "suspect class." 68 Ill. 2d 88, 96-97; People v. Valley Steel Products Co. (1978), 71 Ill. 2d 408, 420-21.

We doubt whether a defendant's interest in making a statement in his own behalf approaches in importance his interest in securing effective appellate review. We also doubt that a classification based on the nature of the crime committed by the defendant can be equated with a classification based on race, sex, or economic status. But in any event the defendant has not shown that he was adversely affected by the classification of which he complains. What section 5--4--1(a)(5) provides is the right of allocution in its traditional context: the opportunity to make a statement to the court in the course of a sentencing procedure in which the jury plays no role. That opportunity, even though it is not required by the statute, was offered him. What the defendant sought was the opportunity to make an unsworn statement to the sentencing jury for consideration along with testimony given under oath and the arguments of counsel. The legislature may well have considered that such a statement would at the least confuse the jurors, and might also impair their ability to weigh the aggravating and mitigating factors dis-

closed by the testimony as the statute directs them to do.

The defendant asserts that the Act violates the portion of article I, section 11, of the 1970 Illinois Constitution which provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." His objection is that the Act does not require either the sentencing jury or the court to make a determination that there is no likelihood that the defendant can be restored to useful citizenship, and that no such finding was made. As noted elsewhere in this opinion, the Act requires the court to enter judgment on the jury's verdict, and discussion of the defendant's objection is therefore limited to his claim that the jury must make the determination referred to.

The constitutional provision does not reflect any intention by the Constitutional Convention to prohibit imposition of the death penalty. On the contrary, article VI, section 4(b), of the 1970 Illinois Constitution, which provides that appeals in capital cases shall be taken directly to this court, presupposes that death sentences will be given. Moreover, the Constitutional Convention submitted to the voters on a separate ballot the question whether the death penalty should be abolished, and the proposition was not approved. Ill. Ann. Stat., art. I, § 11, Constitutional Commentary, at 545 (Smith-Hurd 1971).

The legislature has implemented the Constitutional directive by section 1--1--2 of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 1001--1--2), which states:

> "The purposes of this Code of Corrections are to:
>
> (a) prescribe sanctions proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders;
>
> (b) forbid and prevent the commission of offenses;
>
> (c) prevent arbitrary or oppressive

treatment of persons adjudicated offenders or delinquents; and

(d) restore offenders to useful citizenship."

The meaning of article I, section 11, has been considered in connection with contentions that the term of imprisonment to which a defendant was sentenced was unduly long (People v. Carlson (1980), 79 Ill. 2d 564; People v. Perruquet (1977), 68 Ill. 2d 149), or that probation should have been granted (People ex rel. Ward v. Moran (1973), 54 Ill. 2d 552; People v. Waud (1977), 69 Ill. 2d 588). These decisions confirm what is implicit in the language of article I, section 11, of the Constitution, and section 1--1--2 of the Unified Code of Corrections: The possibility of an individual offender's rehabilitation is not the sole factor to be considered in sentencing, and the court is also to consider whether the seriousness of the offense and the protection of the interests of society call for a sentence of severity. People ex rel. Ward v. Moran (1973), 54 Ill. 2d 552, 556-57; People v. Perruquet (1977), 68 Ill. 2d 149, 155; People v. Waud (1977), 69 Ill. 2d 588, 596; cf. People v. Carlson (1980), 79 Ill. 2d 564, 587.

Upon a conviction of murder, the alternative to a death sentence is a determinate sentence of imprisonment for either a term of not less than 20 and not more than 40 years or a term of natural life imprisonment. (Ill. Rev. Stat. 1979, ch. 38, par. 1005--8--1(a)(1).) For this reason the legislature might reasonably have concluded that the rehabilitative potential of the offender was not a relevant factor and that the jury need not consider it.

Even if the contrary assumption is made, however, we find no prejudicial error. Section 9--1(c) of the Act requires that the jury consider "any mitigating factors which are relevant to the imposition of the death penalty" (Ill. Rev. Stat. 1979, ch. 38, par. 9--1(c)), including factors other than those included in the Act. The jury was instructed to consider not only the mitigating factors enumerated in section 9--1(c) but also

"any other facts or circumstances that provide reasons for imposing less than the death penalty." The defendant introduced no evidence at the sentencing hearing; he did not object to the instruction given by the court; he tendered no instruction directing the jury explicitly to consider whether the defendant could be restored to useful citizenship; and in argument to the jury his counsel did not assert that the defendant had a potential for rehabilitation.

The defendant contends that the Act does not provide for meaningful appellate review, since it does not require the jury to make specific findings of what aggravating and mitigating factors it relied upon in reaching its verdict. As a result, according to the defendant, this court cannot make a comparison between this and other capital cases, and therefore cannot prevent the death penalty from being inflicted capriciously. This general contention was rejected in People v. Brownell (1980), 79 Ill. 2d 508, 541-44 (cf. People v. Lewis (Nov. 13, 1981), No. 52338, slip op. at 9), and our holding there also disposes of the particular objection made by the defendant to the verdict in the present case.

As stated previously in this opinion, the defendant was found guilty of the murder of Davis and McCall and of the armed robbery of Davis and Thomas. The sentencing hearing was conducted in two phases, of which the first was concerned only with whether the defendant was eligible for a death sentence under section 9--1(b). This phase terminated in the return of a verdict which contained the following finding:

> "We further unanimously find beyond a reasonable doubt that the following statutory aggravating factor exists in relation to this offense: The murdered individual was killed in the course of an armed robbery, or the defendant has been convicted of murdering two or more individuals." (Emphasis added.)

This language is the same as that of the form of verdict which was submitted by the State and was given to the jury without objection.

In the second phase of the sentencing hearing, which involved the jury's consideration of aggravating and mitigating factors under section 9--1(c), the verdict, which also followed a form of verdict submitted without objection from the defendant, was as follows:

> "We, the jury having found the existence of a statutory aggravating factor, have considered aggravating and mitigating factors relating to the imposition of the death penalty in this case.
>
> We unanimously conclude that there are no sufficiently mitigating factors to preclude the imposition of the death sentence upon the defendant DICKEY GAINES and that the court shall sentence the defendant to death."

Because the finding in the first verdict establishing eligibility for a death sentence is stated only in the disjunctive, the defendant argues, the sentencing verdict must be regarded as leaving unspecified the aggravating factor on which it is based. As we have just pointed out, however, under the decision in Brownell specificity in this regard is not required.

The defendant goes on to argue, however, that if the death sentence rests on a finding that the murdered individual was killed in the course of an armed robbery, the sentence cannot stand, since no armed robbery took place. This latter assertion is based on the contention discussed earlier in this opinion that there was no proof of an armed robbery either of Davis or of Thomas. We have, of course, held that the robbery of Thomas was proved, even though that of Davis was not, but in any event the existence of the other aggravating factor, that the defendant was convicted of murdering two or more individuals, is not disputed.

Objection is also made to the denial by the trial court of the defendant's motion to set aside the sentencing verdict as erroneous. Under the holding of People v. Lewis (Nov. 13, 1981), No. 52338, slip op. at. 10, the court was without authority to do so.

The defendant contends that his execution is

barred by section 122--1 of the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1979, ch. 38, part. 122--1), which provides in pertinent part:

> "Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. *** No proceedings under this Article shall be commenced more than 20 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence."

Citing People v. Dale (1950), 406 Ill. 238, 247, People v. Lewis (1952), 413 Ill. 116, 120, and People v. Thomas (1970), 45 Ill. 2d 68, 73, the defendant maintains that since his sentence ordered that he be confined in the penitentiary while awaiting execution, section 122--1 applies to him, and that he is entitled to relief on the same basis as a person who is confined in the penitentiary pursuant to a sentence of imprisonment. Such a person, he states, may apply for post-conviction relief should new evidence be discovered showing that he did not commit the crimes of which he was convicted, or if a future decision by the Supreme Court should confer some new constitutional right which was not recognized when the defendant was tried and convicted. As illustrations of that situation the defendant cites Furman v. Georgia (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, Gideon v. Wainright (1963), 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, and Miranda v. Arizona (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602.

The defendant argues that a person who is sentenced to capital punishment, on the other hand, is deprived of post-conviction relief in such circumstances, since his execution will have rendered his case moot. The defendant thus concludes that if section 122--1 is to be given effect he cannot be executed until November 2, 1999, 20 years after

his conviction. If the death penalty act is not so construed, he urges, then it is invalid under the equal protection clause as creating an unreasonable classificaton between those persons who are sentenced to death and those who are sentenced to imprisonment.

So far as the question of statutory construction is concerned, the defendant's argument is plainly unsound. Both in 1949, when the Post-Conviction Hearing Act was enacted, and in 1965, when section 122--1 was amended to increase the limitations period to 20 years after conviction, the death penalty existed in Ilinois, its legitimacy as yet undisturbed by Furman v. Georgia (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, and Moore v. Illinois (1972), 408 U.S. 786, 33 L. Ed. 2d 706, 92 S. Ct. 2562. The present death penalty act, which was passed in 1977, contains no provision that the execution of a death sentence should be stayed for 20 years (during which the defendant would necessarily be kept in prison), and it is inconceivable that the legislature intended such an anomalous result. Nor is it true that the legislature may not constitutionally differentiate between those persons who have been sentenced to death and those who have been sentenced to imprisonment. People ex rel. Kotsos v. Tucker (1977), 68 Ill. 2d 88, 96-98.

Whether new evidence exculpating the defendant would be discovered, and whether some future decision will announce a new doctrine which would invalidate his conviction are at best speculative. But that consideration aside, the deprivation of any such potential benefits does not spring from the limitations of the Post-Conviction Hearing Act, but from the defendant's death.

The defendant's argument thus reduces to that proposition that the death penalty is per se unconstitutional. That view was adopted by the Supreme Judicial Court of Massachusetts in District Attorney v. Watson (1980), __ Mass. ___, 411 N.E.2d 1274, cited by the defendant, where the court held that the death penalty violated a provision of the State Constitution forbidding cruel or unusual punishment. The court's opinion cites

the same loss of potential future benefits on which the defendant rests his argument here. (See ___Mass. ___, ___, 411 N.E.2d 1274, 1282.) Such a view finds no support, however, in either the decisions of this court or those of the United States Supreme Court, only two of whose members subscribe to it. See, e.g., Gregg v. Georgia (1976), 428 U.S. 153, 227, 231, 49 L. Ed. 2d 859, 904, 907, 96 S. Ct. 2909 (dissenting opinions of Justice Brennan and Justice Marshall).

For the reasons given in this opinion, the judgment of the circuit court of Cook County convicting the defendant of murder and sentencing him to death is affirmed. It is directed that the sentence shall be carried out on Friday, May 21, 1982, at the Illinois State Penitentiary in Joliet.

Judgment affirmed.

MR. CHIEF JUSTICE GOLDENHERSH, concurring:

For the reasons stated in my concurrence in People v. Lewis (Nov. 13, 1981), No. 52338, I concur in this opinion.

MR. JUSTICE CLARK, dissenting:

On December 23, 1978, Officer Dwyer, at the home of the defendant's mother and with her permission, monitored the phone conversation between the defendant and his mother. He did this by picking up the extension telephone located in the next room. Under section 14--2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 14--2), a person does not commit eavesdropping if all of the parties to the conversation have consented or any party gives permission and the use of an eavesdropping device has been judicially authorized (Ill. Rev. Stat. 1977, ch. 38, par. 14--2; Ill. Rev. Stat. 1977, ch. 38, par. 108A et seq.). Section 108A--6 of the Code of Criminal Procedure of 1963 provides for an emergency exception to normal procedures. If a reasonable effort has been made to contact the appropriate State's Attorney, a law-enforcement officer may use an eavesdropping device in an "emergency situation." An emergency situation exists when the conversation to be

"overheard" will occur shortly and the officer had not been aware for a sufficiently long enough time to obtain prior judicial approval (Ill. Rev. Stat. 1977, ch. 38, par. 108A--6). Officer Dwyer did not have the consent of both parties to the conversation. He did not obtain prior judicial approval, and he made no effort to contact the appropriate State's Attorney. A persuasive argument could have been proffered that in this case it would have been physically impossible for Officer Dwyer to obtain prior approval or even attempt to contact a State's Attorney. However, in all "emergency" situations an application for approval of the use of an eavesdropping device "*** must be made within 48 hours of the commencement of such use. *** In order to approve such emergency use, the judge must make a determination (1) that he would have granted an order had the information been before the court prior to the use of the device and (2) that there was an emergency situation as defined in this Section." (Ill. Rev. Stat. 1977, ch. 38, par. 108A--6(b).) No application was ever made. It is axiomatic that without such an application no authorization could have been given. Without subsequent approval the contents of the conversation overheard are treated as having been obtained in violation of the article 108A requirements mandating judicial supervision (Ill. Rev. Stat. 1977, ch. 38, par. 108A--6(c)). And without such authorization, section 14--5 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 14--5) provides that any evidence obtained as a result of the eavesdropping (as defined in section 14--2) is inadmissible (People v. Kurth (1966), 34 Ill. 2d 387).

The majority holds that since an extension telephone did not constitute an eavesdropping device, as defined by section 14--1(a), then the monitoring of the conversation was not proscribed by section 14--2(a). The majority contends that People v. Dixon (1961), 22 Ill. 2d 513, was not overruled by People v. Kurth (1966), 34 Ill. 2d 387. The court goes on to say that the decision in Kurth "turned on the holding that even though the device had been installed by one of the parties to

the conversation, another party was not precluded from having the conversation excluded from evidence." (Slip op. at 16.) The majority concluded that "[t]he court overruled Dixon only with respect to that issue." (Slip op. at 16. See 34 Ill. 2d 387, 395.) But to that extent Dixon was overruled, and that is precisely what is at issue here. The defendant did not have knowledge and did not consent. Recordings of this conversation would clearly be inadmissible against the defendant. So too should the conversations as repeated by the police officer.

A person commits eavesdropping when he uses an eavesdropping device to hear or record any part of a conversation (Ill. Rev. Stat. 1977, ch. 38, par. 14--2). The term "eavesdropping device" is defined by section 14--1(a) of the Criminal Code of 1961 as "*** any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means ***." (Emphasis added.) (Ill. Rev. Stat. 1977, ch. 38, par. 14--1(a).) This does not include hearing-aid devices used to help the hard-of-hearing (Ill. Rev. Stat. 1977, ch. 38, par. 14--1(a)). When an extension telephone is used for the sole purpose of surreptitiously overhearing the conversation of two parties, then it becomes an eavesdropping device even though one party may have consented. In People v. Perez (1968), 92 Ill. App. 2d 366, the police attached an aparatus to the earphone of a telephone to secretly overhear and record the conversation. This apparatus enabled others in the room to listen undetected to both sides of the conversation. The court considered this an eavesdropping device. There is no logical distinction between the apparatus in Perez and the extension telephone here, when one considers the manner in which the phone is being used. The application of this statute should not turn on the type of equipment utilized. The privacy of a telephone conversacion was invaded without proper authority in a manner offensive to the language of section 14--2. Officer Dwyer used the extension telephone for only one purpose; to overhear the telephone conversation of the defendant

without detection.

In United States v. Harpel (10th Cir. 1974), 493 F.2d 346, 350, the court noted that "[i]t is the means whereby the contents of the conversation are acquired that is crucial." The majority is correct in pointing out the differences between the Federal statute as construed in Harpel (18 U.S.C. §§ 2510 to 2520 (1970)) and the Illinois statute. However, the Harpel court's rationale is sound. The court in Harpel refuted the contention that the use of an extension telephone does not violate the Federal eavesdropping statute. (493 F.2d 346, 351.) The court said that the use of an extension telephone, with the consent of one party, to overhear a conversation does not violate Federal law. However, when the extension telephone is being used to overhear a conversation without any consent, then a violation does occur. It becomes apparent, then, that an extension telephone, when used to surreptitiously overhear a conversation, is an eavesdropping device, and statutory requirements regulating the use of such devices must be complied with.

The Pennsylvania Supreme Court in Commonwealth v. Murray (1966), 423 Penn. 37, 223 A.2d 102, indicated that, while in a majority of instances an extension telephone is not an eavesdropping device, "[i]t is not what the telephone extension is that may make it illegal in certain circumstances, but the use to which it is put." (423 Penn. 37, 50, 223 A.2d 102, 109.) The commonplaceness of the device is not the criterion for determining the criminality of its employment. (423 Penn. 37, 50, 223 A.2d 102, 109.) See Campiti v. Walonis (1st Cir. 1979), 611 F.2d 387 (an extension telephone used to monitor conversations of prison inmates is an intercepting device).

The officer's testimony concerning the defendant's conversation was tainted, since it was the product of unlawful eavesdropping. The contents of that conversation should have been suppressed. If the conversation resulted in the discovery of the gun, it too should have been suppressed. Any product of such eavesdropping is excludable as a "fruit of the poisonous tree." (Wong Sun v. United

States (1963), 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407; Costello v. United States (1961), 365 U.S. 265, 5 L. Ed. 2d 551, 81 S. Ct. 534.) Any information obtained in violation of the eavesdropping statute is not admissible. (Ill. Rev. Stat. 1977, ch. 38, par. 14--5.) This applies both to primary evidence (the conversation) and any derivative evidence acquired as a logical consequence of the officer's unlawful eavesdropping.

MR. JUSTICE SIMON, also dissenting:

I concur in the dissenting opinion of Mr. Justice Clark and, for the reasons stated in that dissent, I think the defendant should receive a new trial. I also dissent for the reasons stated in my dissent in People v. Lewis (Nov. 13, 1981), No. 52338.

I would like to add the following observations to Mr. Justice Clark's dissent. Although Officer Dwyer had the consent of the defendant's mother to overhear her conversation with her son, it is not clear from the record that Michael Gaines consented to Officer Dwyer listening in when he talked with the defendant. In addition, the fact that the police may already have had information pointing to the defendant's complicity does not justify Officer Dwyer's testimony which related the statements by the defendant to his mother and brother. Those statements are set forth in the majority opinion. They are clearly self-incriminatory, and Officer Dwyer's testimony about them was inadmissible because of the eavesdropping statute.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

EXHIBIT C

February 2, 1982

Mr. Carl M. Walsh
Attorney at Law
39 South LaSalle Street
Suite 920
Chicago, IL 60603

In re: People State of Illinois, appellee, vs.
Dickey Gaines, appellant. No. 52734

Dear Mr. Walsh:

The Supreme Court today made the following announcement concerning the above entitled cause:

On the court's own motion, the mandate is stayed pending the timely filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States.

Very truly yours,

Clerk of the Supreme Court

RHG:jae
cc:Lonny B. Ogus
Tyrone C. Fahner
Richard M. Daley

Exhibit D

TABLE OF CONTENTS OF

THE "RECORD"

People's answer to defendant's

Motion for pre-trial discovery

(Filed 5/7/79).....C-38

Motion to suppress illegally

eavesdropped conversations

(Filed 7/10/79).....C-48

Motion for severance

(Filed 7/10/79).....C-52

Answer to defendant's Motion

to suppress conversations

(Filed 7/27/79).....C-58

Memorandum

(Filed 7/27/79).....C-60

Trial testimony of Investigator Robert Dwyer. Date of hearing. 10/9/79.

D	C
632	663

1 / C. Refers to the record.

2 / The above indicates where the matter can be found in the "record".

3 / Investigator Robert Dwyer's testimony can be found in the TR. 632-664.

4 / TR. Refers to the trial transcript.

No. 81-6323

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES.

PETITIONER.

VS.

STATE OF ILLINOIS.

RESPONDENT.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND TO PROCEED IN FORMA PAUPERIS.

The petitioner, Dickie Gaines, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has not sought to proceed in forma pauperis in no other Court. In support of this motion, petitioner states as follow:

1. On December 4, 1981, the Illinois Supreme Court affirmed petitioner's conviction and death sentence.

2. On January 15, 1982, petitioner filed with the Illinois Supreme Court a petition for rehearing.

3. On January 29, 1982, the Illinois Supreme Court denied petitioner's rehearing petition.

4. On February 2, 1982, the Illinois Supreme Court upon "it's own motion" Stayed the mandate of execution, pending the timely filing and disposition of a petition for writ of certiorari to the United States Supreme Court.

5. Petitioner has filed with this Court, a timely petition for writ of certiorari.

Wherefore, Petitioner Dickie Gaines, respectfully prays that this Court will grant this motion.

Respectfully Submitted

Dickie Gaines

Appearing Pro Se.

Dickie Gaines. #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

Subscribed and sworn to before me

this 3 day of March 1982

Charles R. Mattingly

Notary Public.

My Commission Expires October 1, 1985

My Commission Expires.

STATE OF ILLINOIS)
) SS
COUNTY OF RANDOLPH)

A F F I D A V I T

I, Dickie Gaines, being duly sworn, and swearing on his oath deposes and states:

I am the petitioner in this case; that in support of my motion to proceed on writ of certiorari, without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. I, Dickie Gaines, is incarcerated at the Menard Correctional Center, address, Lock Box 711, Menard, Illinois 62259.

2. Are you presently employed???????

Yes ( ) No (X)

My last day of employment was, 12-11-78. I received a salary of $700.00 per month.

3. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source??????

Yes ( ) No (X)

4. Do you own any cash or checking or saving account??????

Yes (X) No ( )

I have an account here at the Correctional Facility.

C E R T I F I C A T E

I hereby certify that the petitioner herein has the sum of $ 38.34 on account to his credit at the correctional institution where he is confined.

Randall Johnson
Authorized Officer of Institution

Trust Officer 3-2-82
Title.

STATE OF ILLINOIS }
COUNTY OF RANDOLPH } SS

A F F I D A V I T (Continue)

5. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)??

Yes ( ) No (X)

6. List the persons who are dependent upon you for support and state your relationship to those persons.

I have no one, who is depending upon me for support financially.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury..

Respectfully Submitted

Dickie Gaines

Mr. Dickie Gaines, #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

Subscribed and sworn to before me

this 3 day of March 1982

Notary Public.

My Commission Expires October 1, 1985

My Commission Expires.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES.

PETITIONER.

VS.

STATE OF ILLINOIS.

RESPONDENT.

ORDER

It is hereby ordered, that petitioner, Dickie Gaines be allowed to proceed on petition for writ of certiorari in forma pauperis.

DATED: _____

ENTER _____
JUSTICE.

Supplemental Brief

1

No. 81-6323

RECEIVED
APR 19 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES.

PETITIONER.

VS.

STATE OF ILLINOIS.

RESPONDENT.

MOTION TO DISMISS, PETITIONER'S (PRO SE)

CERTIORARI PETITION.

NOW COMES, the petitioner herein Dickie Gaines and respectfully moves this Court to grant the above entitled motion, and in support of said motion, petitioner states as follow.

1. Petitioner herein, Dickie Gaines has filed with the Illinois Supreme Court a voluntarily, intelligently, and knowingly Motion to waive all appeal proceedings and demand to be executed.

2. Petitioner herein, requests this Court to dismiss his pro se certiorari petition, because the petitioner herein Dickie Gaines demands to be executed, and does not want to appeal the judgment of the Illinois Supreme Court in the case of People vs. Gaines. No. 52794 (See ~~attached~~ enclosed motion).

3. Petitioner requests this Court to grant this Motion to dismiss my pro se certiorari petition so that my execution can be carried out.

Wherefore, petitioner herein, Dickie Gaines demands that this Court dismiss his pro se certiorari petition so that his execution can be carried out.

Subscribed and sworn to before me
this_____day of_____1982

_____
Notary Public.

_____
My Commission Expires.

Notary Public unavailable.

Respectfully Submitted
Mr. Dickie Gaines. #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

_____
Signature.

STATE OF ILLINOIS }
COUNTY OF RANDOLPH } SS

AFFIDAVIT

I, Dickie Gaines, being duly sworn, and swearing on his oath, deposes and states as follow:

1. That I, Dickey Gaines knowingly and intelligently signed and submitted the attached motion to dismiss my pro se certiorari petition.

2. That I, Dickie Gaines demand for this Court to dismiss my certiorari petition so that my execution can be carried out.

3. That I, Dickie GAINES filed a notion with the Illinois Supreme Court waiving all rights to appeal there decision in the case of People vs. Gaines. No. 52794

4. That I, Dickie Gaines clearly understands and knows the contents of the attached motion.

I, Dickey Gaines declares that his motion to dismiss his certiorari petition is submitted to this Court voluntarily, intelligently, and knowingly.

Subscribed and sworn to before me
this _____day of_____1982

_____
Notary Public.

_____
My Commission Expires.

Note. There was no notary public available at the tine for this document to be notarized.

Respectfully Submitted
Mr. Dickie Gaines. #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

Dickie Gaines
Dickie Gaines.

No. 81-6323 44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES.

PETITIONER.

VS.

STATE OF ILLINOIS.

RESPONDENT.

ORDER

It is hereby ordered, that the petitioner's motion to dismiss his pro se certiorari petition is granted..

Dated

ENTER

JUSTICE.

ORIGINAL

No. 81-6323

RECEIVED
APR 19 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

9

APR 23 PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES.

PETITIONER.

VS.

STATE OF ILLINOIS.

RESPONDENT

NOTICE OF PROOF OF SERVICE

TO. Richard M. Daley	Tyrone C. Fahner	Clerk's Office
State's Attorney of	Attorney General	Illinois Supreme Court
Cook County	State of Illinois	Supreme Court Building
Room 500 - Daley Center	188 West Randolph Street	Springfield, Illinois
Chicago, Illinois 60602	Chicago, Illinois 60601	62706

PLEASE TAKE NOTICE, that on April 15, 1982, I caused to file with the United States Supreme Court that attached Motion to dismiss my Pro Se certiorari petition.

Dickie Gaines

Dickie Gaines. #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

STATE OF ILLINOIS }
COUNTY OF RANDOLPH } SS

I, Dickie Gaines being first duly sworn, on oath deposes and says that he served copies of the above mentioned papers by depositing same in the United States Mailbox at the Menard Correctional Center on April 15, 1982 at 21:30 P.M. properly stamped with prepaid postage, to the above named.

Subscribed and sworn to before me
this_____day of_____1982

Notary Public.

My Commission Expires.

Respectfully Submitted

Dickie Gaines

DICKIE GAINES.

Note. There was no notary public available at the time to get this document notarized

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff- Appellee,

VS.

No. 52794

DICKIE GAINES.

Defendant-Appellant,

MOTION FOR WAIVER TO CHALLANGE THE DECISION OF THE ILLINOIS SUPREME COURT IN PEOPLE vs. GAINES, No. 52794

NOW COMES, the defendant Dickey Gaines, respectfully moves this Court to grant the above entitled motion, and in support of Motion defendant states as follow:

1. This Court affirmed the defendant conviction and death sentence on December 4, 1981. This Court denied defendant petition for rehearing on January 29, 1982.

2. Defendant filed a (Pro Se) certiorari petition with the United States Supreme Court on March 3, 1982. Defendant herein has filed a motion with the United States Supreme Court to dismiss the certiorari petition. (See enclosed Motion).

3. Defendant herein, Dickie Gaines intelligently and knowingly demands to waive his right to appeal the judgment of the Illinois Supreme Court in the case of People vs. Gaines, No. 52794.

4. Defendant herein, Dickey Gaines clearly understands, that he has a right to appeal the decision of the Illinois Supreme Court, but demands to waive this right to appeal. This waiver of right to appeal, is made voluntary, intelligently and knowingly made.

5. Defendant herein, Dickey Gaines demands that his execution be carried out. Defendant herein, Dickie Gaines demands this Court to reject any amicus brief or motion, or petition filed by any other attorney, organization, etc to prevent his execution from being carried out.

6. Defendant herein, Dickey Gaines demands to be executed, and anything short of that is cruel and unusual punishment.

7. Reiterating, defendant herein, Dickie Gaines voluntarily, intelligently, and knowingly waives his right to appeal the judgment of this court in the case of People vs. Gaines. No. 52794. Defendant herein, Dickie Gaines demands to be executed.

8. Defendant herein, Dickey Gaines demands this Court to reject anykind of motion, petition, or amicus brief filed by any attorney, organization, etc in trying to stop defendant's execution.

Dickie Gaines

Dickie Gaines. #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

WHEREFORE, defendant herein, Dickie Gaines demands that this motion be granted.

Subscribed and sworn to before me

this_____day of_____1982

_____

Notary Public.

_____

My Commission Expires.

Respectfully Submitted
Mr. Dickie Gaines. #C-71796
Lock Box 711
Menard, Illinois 62259

Dickie Gaines

Dickie Gaines.

Note. There was no notary public available at the time to get this document notarized.

STATE OF ILLINOIS }
COUNTY OF RANDOLPH } SS

AFFIDAVIT

I, Dickie Gaines, being duly sworn and swearing on his oath, deposes and states as follows

1. That I, Dickie Gaines voluntarily, intelligently, and knowingly waives his right to appeal the decision of the Illinois Supreme Court.

2. I, Dickie Gaines has a right to demand that his execution by carried out, and that anything short of that would constitute cruel and unusual punishment.

3. I, Dickie Gaines does not want this Court to except anykind of legal litigation filed by some attorney, organization, etc in trying to prevent his execution from being carried out.

4. I, Dickie Gaines insist and demand as my right to be executed.

5. That I, Dickie Gaines clearly understands the contents of the attached motion.

6. That I, Dickie Gaines clearly understands, that if this Court grants the motion that I will be executed as I demand to be.

That the foregoing is true and correct, and that the Defendant herein, Dickie Gaines in his proper person submitted and signed this affidavit and motion.

Subscribed and sworn to before me

this_____day of_____1982

_____
Notary Public.

_____
My Commission Expires.

Note. There was no notary public available at the time for this document to be notarized.

Respectfully Submitted
Mr. Dickie Gaines. #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

Dickie Gaines
Dickie Gaines.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

VS. No. 52794

DICKIE GAINES,

Defendant-Appellant,

ORDER

It is hereby ordered, that the Defendant herein, Dickie Gaines be granted the relief ~~demanded~~ to be executed...

DATED ENTER

JUSTICE.

RECEIVED
APR 19 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff- Appellee,

VS.

No. 52794

DICKIE GAINES,
Defendant- Appellant.

NOTICE AND PROOF OF SERVICE

TO: Richard M. Daley
State's Attorney of
Cook County
Room 500 - Daley Center
Chicago, Illinois 60602

Clerk's Office
United states Supreme Court
1 First Street N.E.
Washington, D.C. 20543

Tyrone C. Fahner
Attorney General
State of Illinois
188 West Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on April 15, 1982, I caused to be filed with the Illinois Supreme Court the attached Motion for waiver to challenge the decision of the Illinois Supreme Court in People vs. Gaines. No. 52794.

Dickie Gaines

Dickie Gaines. #C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

STATE OF ILLINOIS }
COUNTY OF COOK } SS

I, Dickie Gaines being first duly sworn on oath, deposes and says that he served copies of the above mentioned papers and this Notice by depositing same in the United States Mailbox at the Menard Correctional CENTER on April 15, 1982 at 11:30 P.M. properly stamped with prepaid postage to the aboved named.

Subcribed and sworn to before me
this_____day of_____1982

Dickie Gaines

Dickie Gaines.

Notary Public.

Note: There was no notary public available at the time to get this document notarised.

My Commission Expires.

Supplemental Brief

2

SUPREME COURT OF THE UNITED STATES

RECEIVED
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SUPREME COURT, U.S.

DICKIE GAINES,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 81-6323
	)	
STATE OF ILLINOIS,	)	
	)	
Respondent-Appellee.	)	

MOTION TO ORDER A HEARING TO DETERMINE COMPETENCY OF PETITIONER-APPELLANT TO WITHDRAW HIS PETITION FOR A WRIT OF CERTIORARI

IRA A. MOLTZ, attorney appointed by the Illinois Supreme Court to represent Petitioner-Appellant, DICKIE GAINES, respectfully moves this Honorable Court to order a Rees hearing pursuant to Rees v. Peyton, 384 U.S. 312 (1966) for the purpose of determining DICKIE GAINES' competency to withdraw his Petition for a Writ of Certiorari.

In support thereof, counsel states as follows:

1. That DICKIE GAINES was convicted of the offense of murder and sentenced to death in the Circuit Court of Cook County, Illinois.

2. That the Illinois Supreme Court affirmed the conviction and death sentence on December 4, 1981, and subsequently denied a rehearing on January 29, 1982. People v. Gaines, 88 III.2d 342 (1982).

3. That GAINES discharged the attorneys who had previously represented him and filed a pro se petition for a Writ of Certiorari on March 8, 1982.

4. That on March 31, 1982, the Illinois Supreme Court appointed IRA A. MOLTZ as counsel for GAINES. The Illinois Supreme Court acted on its own motion in ordering said appointment of counsel, apparently acting because of the death sentence imposed on GAINES. A copy of the Illinois Supreme Court's Order appointing IRA A. MOLTZ as counsel is attached to this Motion as Exhibit "A".

5. That IRA A. MOLTZ met with DICKIE GAINES at the Menard Correctional Center, Illinois, on April 15, 1982 and GAINES indicated a desire to contest his murder conviction and left open the possibility of contesting the death sentence as well.

6. That on April 16, 1982, GAINES telephoned MOLTZ and told him that GAINES had decided to withdraw his pro se petition for a Writ of Certiorari and had filed such a motion with this Court. In addition, GAINES stated that he had filed a motion with the Illinois Supreme Court indicating that he no longer wished to contest his conviction or sentence.

7. At no time on April 15, 1982 did GAINES express the intention to withdraw his certiorari petition or to seek no further review of his conviction and sentence. To the contrary, while GAINES was unsure about seeking review of the death penalty, he indicated a strong desire to contest his conviction.

8. That the constitutionality of the Illinois death penalty statute (Ill. Rev. Stat., 1979, ch. 38, par. 9-1) has never been ruled on by this Court and was upheld by the Illinois Supreme Court by a slim 4-3 margin. People ex rel. Carey v. Cousins, 77 III.2d. 531 (1979). Four of the seven presently sitting members of the Illinois Supreme Court have found this statute to be unconstitutional, though the three dissenters in Cousins, supra, feel bound to uphold the statute because of the doctrine of "stare decisis." People v. Lewis, 88 III.2d. 129 (1982), currently pending on a petition for a Writ of Certiorari before this Court.

9. No one has been executed in Illinois since the imposition of the death penalty statute in 1977.

10. The above sworn facts require a hearing to determine DICKIE GAINES' competency to direct counsel to forgo further legal action, pursuant to Rees v. Peyton, 384 U.S. 312 (1966). There, one month after Rees filed a petition for a Writ of Certiorari he requested that his petition be withdrawn. Counsel informed the United States Supreme Court that counsel could not conscientiously withdraw the petition because evidence cast doubt

on Defendant's competency to direct his counsel to withdraw the petition. The Court ordered the District Court to determine Rees' competency to forgo further legal actions.

A similar threshold determination was required by the Supreme Court in Bessie Gilmore v. State of Utah, 429 U.S. 1012 (1976). There, the Supreme Court of the United States refused to stay the execution of Gilmore only after its own careful examination of the State court's finding that Gilmore was competent to waive his appeal. id at 1013. In footnote number 5 of Chief Justice Burger's concurrence he notes approvingly that "[a]fter trial,...the State trial court ordered sua sponte that the Utah State Prison psychiatrist or other available psychiatric personnel of the prison examine Gilmore to determine his ability to decide not to appeal." id at 1015, 1016.

WHEREFORE, IRA A. MOLTZ respectfully requests that this Honorable Court not yet rule on DICKIE GAINES' pro se petition for a Writ of Certiorari or on his subsequent motion to withdraw said petition, but that the Court instead remand this cause to either the Illinois Supreme Court or the United States District Court for the Southern Division of Illinois for purposes of conducting a competency hearing pursuant to Rees v. Peyton, supra.

Respectfully submitted,

IRA A. MOLTZ
Counsel for DICKIE GAINES appointed
by the Illinois Supreme Court
20 N. Clark Street
Suite 2300
Chicago, Illinois
(312) 236-3709

AFFIDAVIT

I, IRA A. MOLTZ, being first duly sworn say that the facts stated in the foregoing motion are true and correct to the best of my knowledge.

Ira A. Moltz

SUBSCRIBED and SWORN to
before me this 19th day
of April, 1982.

Notary Public

SUPREME COURT OF THE UNITED STATES

DICKIE GAINES,
Petitioner-Appellant
v.
STATE OF ILLINOIS,
Respondent-Appellee.

No. 81-6323

NOTICE OF MOTION

TO: Dickie Gaines
C-71796
Box 711
Menard, IL 62259

Richard M. Daley
State's Attorney of Cook County
Room 500
Daley Center
Chicago, IL 60602

Tyrone C. Fahner
Illinois Attorney General
188 W. Randolph
Chicago, IL 60601

Please take notice that on April 19, 1982 I have filed with the Clerk of the United States Supreme Court a Motion To Order A Hearing To Determine Competency Of Petitioner-Appellant To Withdraw His Petition For A Writ Of Certiorari, a copy of which is attached hereto.

Ira A. Moltz
IRA A. MOLTZ

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, IRA A. MOLTZ, being first duly sworn on oath, deposes and says that he served a copy of the above Motion on the above parties by depositing the same in the U.S. mail at 20 N. Clark Street, Chicago, Illinois on April 19, 1982, postage prepaid.

Ira A. Moltz
IRA A. MOLTZ

SUBSCRIBED and SWORN to before me this 19th day of April, 1982.

Notary Public

EXHIBIT A

No. 52794 - Adv. 92 People State of Illinois, appellee, vs. Dickey Gaines, appellant.

The portion of the motion by appellant, pro se, that he be furnished a copy of the transcript of oral argument on March 11, 1981, is denied. That part of the motion by appellant, pro se, that he be furnished a copy of all docket entries in this case is allowed.

The defendant in the captioned case has discharged and has persisted in rejecting the services of appointed counsel. Defendant furthermore insists on preparing and filing without counsel a pro se petition for writ of certiorari to the Supreme Court of the United States. However, this court deems it necessary to appoint counsel for the purpose of consultation with the defendant should he request it. Appointed counsel should also be available for presentation of matters should the Supreme Court of the United States desire clarification of issues or questions which defendant may seek to present to that Court. It is therefore, ordered that Ira Holtz is hereby appointed as counsel to assist defendant in his appeal to the Supreme Court of the United States should defendant request his assistance and for the further purposes indicated above.

United States of America

State of Illinois
Supreme Court } ss.

I, Robert H. Gillespy, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof, do hereby certify the foregoing to be a true copy of an order entered by the Supreme Court on March 31, 1982, in a certain cause entitled:

People State of Illinois, Appellee	)	
No. 52794 vs.	)	Appeal from Circuit Court Cook County
Dickey Gaines, Appellant	)	

Filed in this office on the 10th day of December A. D. 19 79

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 31st day of March 19 82

ROBERT H. GILLESPY
Clerk,
Supreme Court of the State of Illinois.

By: H. Wayne Russell
Deputy Clerk

Opposition

NO. 81-6323

RECEIVED
APR 28 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DICKIE GAINES
Petitioner,
vs.
THE STATE OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION AND RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR A COMPETENCY HEARING.

TYRONE FAHNER
Attorney General
State of Illinois
MICHAEL WEINSTEIN,
Assistant Attorney General
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Chicago, Illinois 60601

Attorneys for Respondent.

RICHARD M. DALEY
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Counsel of Record
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Of Counsel
(312) 443-5496

QUESTIONS PRESENTED

Whether the overhearing of Petitioner's conversations by the police on an extension telephone comported with the Fourth Amendment where the Illinois Supreme Court has held that an extension telephone is not an eavesdropping device under Illinois law.

Whether the testimony of an investigator concerning the statements of Petitioner's brother was cumulative of other uncontroverted, eyewitness evidence of the murders where the Petitioner cannot demonstrate any prejudice and whether the holding of the Illinois Supreme Court which was based on the holdings of this Court comports absolutely with the opinions of this Court.

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NO. 81-6323

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DICKIE GAINES
Petitioner,
vs.
THE STATE OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court, affirming petitioner's convictions for murder and armed robbery and affirming the sentence of death is reported as People v. Dickie Gaines, 88 Ill. 2d 342 (1981).

JURISDICTION

As treated more fully in the argument portion of this brief in opposition, the petitioner has failed to satisfy the prerequisites to jurisdiction established by 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The petitioner, Dickie Gaines, was indicted (No. 79 C 485) for the murders of Causia McCall and Andre Davis, the armed robbery of Andre Davis and Lenious Thomas, armed violence and the attempt murder of Lenious Thomas. (R. C14-27). Following a jury trial the petitioner was found guilty on all counts. (R. 801) The People elected to seek the death penalty. Ill. Rev. Stat. 1977, ch. 38, § 9-1(d). The petitioner chose to have the trial jury determine his sentence. Following evidence and arguments the jury fixed the petitioner's sentence at death. (R. 943) The petitioner's appeal was automatically perfected to the Illinois Supreme Court. Ill. Rev. Stat. 1979, Ch. 38 § 9-1(i). The Illinois Supreme Court affirmed the petitioner's conviction and sentence of death and set an execution date of September 22, 1982, and denied rehearing.

THE MURDERS

On the evening of December 21, 1978, Lenious Thomas and Andre Davis went to the Pine Hut Lounge located at 117th and Michigan Ave. in Chicago, Illinois. (R. 484-485) Lenious sat down near the pool table and watched Andre shoot pool with Allen "3 Fingers" Thompson. (R. 486) Sometime later, after 11:00 p.m. Allen saw petitioner and his brother, Michael Gaines, enter the Pine Hut. Allen was previously acquainted with the Gaines brothers. (R. 476-477) Lenious Thomas did not know the petitioner and had never seen him before. (R. 488)

Lenious Thomas asked Andre Davis for a marijuana joint and went out to smoke it with Michael Gaines. He had not met Michael Gaines before that but

did share the joint with him. (R. 519) He had not had anything else to smoke or drink that night. (R. 486-487) After finishing the joint Lenious went back into the bar and sat down again near the pool table. (R. 487)

Allen Thompson continued to play pool with a number of patrons and with Andre Davis. He won $175.00. At closing time Michael Gaines, the petitioner, Andre Davis and Lenious Thomas left the tavern in a group (R. 477-478, 487)

They went to a house where Andre Davis wanted to pick up some clothes. (R. 488) They went upstairs to a back room on the second floor. (R. 488) Someone he did not know was in that room, asleep. Andre tried to wake him up to tell him to give him his boots. (R. 489) The man would not wake up so Andre took the boots off of him and Lenious and Andre walked into a second room. (R. 489)

In this second room someone else Lenious did not know was sleeping on a couch. Andre walked over to the couch. At that moment petitioner and Michael Gaines came up and petitioner said, "This is a stick up". (R. 490) The petitioner had a gun. Lenious had $2.00 in his pocket and pulled it out. Lenious turned toward the petitioner and the petitioner began to shoot. Lenious fell to the floor and the petitioner kept shooting. Lenious did not know how many shots were fired "but it was quite a few". (R. 491)

As he was lying on the floor he heard footsteps and someone entered the room. He heard someone say, "Mike, come on. Let's go." (R. 492) He then heard footsteps leaving. Lenious got up, looked around and saw Andre Davis lying on the floor. (R. 492) He saw one of his dollar bills but the other one was missing. (R. 492) Lenious ran out of the room and down the back stairs into the basement. (R. 492, 497) He kicked out a basement window and ran out of the house through the window. (R. 497-498) He was very scared and upset after the shooting. (R. 537)

Lenious, who was unfamiliar with the neighborhood ran until he ended up at a police station at 115th and Indiana, Chicago, Illinois. (R. 498) He told the police officers that two of his friends had been shot. (R. 499, 536) Lenious got into Officer Carey's squad car. Officer Keating testified that Lenious told them that he could only recognize the house from the back as he had run out the back. (R. 557)

After driving for 5 to 10 minutes they finally located the house at 139 E. 117th Place, Chicago, Illinois. (R. 499, 557) Lenious and the police entered the house. They walked up the stairs and looked into the first bedroom. It was dark and empty. (R. 559) They then proceeded to the middle bedroom. The lights were on. There were two bodies lying on the couch. The bodies appeared to be lifeless. (People's Exhibits 4-7; R. 559)

The window shade in that room contained a hole as did the pane of glass in the window behind the shade. (People's Exhibits 12-13; R. 560-561) The officers notified their supervisor and called the Police Crime Laboratory. (R. 561) Officer Keating testified that during the 10 minutes in which he was in Lenious Thomas' presence Lenious "was quite excited, he kept stating that they tried to kill him and he was very-he was nervous, excited." (R. 562)

Dr. Shaku Teas performed an autopsy on both victims on December 22, 1978. (R. 545) She determined that Causia McCall died as a result of a gun shot wound to the chest. (R. 54) She determined that Andre Davis died as a result of multiple gun shot wounds. (R. 550) Dr. Teas recovered 1 bullet from the body of Causia McCall. (R. 546) She recovered 2 bullets from the body of Andre Davis. (R. 547) The bullets were given to the police. (R. 546)

THE PHYSICAL EVIDENCE

Firearms examiners for the Chicago Police Crime Labratory received the spent bullets recovered from the victims by Dr. Teas. (R. 614-615) They prepared some test firings with the firearm which was recovered after the shooting. After examining all of the spent bullets, those recovered as well as those which had been test fired, the examiners concluded that they could only have been fired by People's Exhibit 15, a Colt Army Special 32-20 revolver. (R. 631) These bullets could not have been fired from any other weapon. (R. 631)

THE INVESTIGATION

On December 23, 1978, at approximately 11:00 a.m. Chicago Police Officer Fleming from the 5th District Tactical Team was dispatched to 11576 South Lafayette, Chicago, Illinois the residence of the Gaines family. (R. 569) He and his partner Officer James Darling, arrived at the residence and were admitted by petitioner's mother Mrs. Gaines, and her daughter. (R. 570) Petitioner's brother, Michael Gaines and an aunt were also present. (R. 570) Approximately half an hour later Investigators Degnan and Dwyer from the homicide unit arrived. (R. 570)

Prior to the arrival of Investigators Degnan and Dwyer, 3 or 4 telephone calls were received. Both Mrs. Gaines and her daughter spoke on the telephone. Michael Gaines spoke for a matter of seconds. (R. 570-571) After the arrival of Investigators Degnan and Dwyer "many" telephone calls were received.

Investigator Robert Dwyer testified that shortly after his arrival the telephone rang. Michael Gaines answered the telephone and called to his mother. He told her that it was the petitioner. (R. 634) Before Mrs. Gaines got to the telephone, Investigator Dwyer asked her if it would be all right if he listened in on an extension telephone. (R. 635) Mrs. Gaines gave the investigator permission to listen and directed him to an extension telephone in the kitchen. She used the telephone in the living room-dining room area. (R. 635)

Investigator Dwyer then listened to the conversation between Mrs. Gaines and the petitioner. (R. 635) Mrs. Gaines said "Hello." The petitioner responded with obscenities. He said,

> What the f--- are you trying to do to me? Why the f--- isn't the family helping me? I know you're helping the police. What the f--- is wrong with Michael? That's all you give a s---about is Michael. Why aren't you getting me the money."...(R. 638)

They discussed getting some money to help the petitioner from a man unknown to the investigator.

Mrs. Gaines chastised the petitioner for using such obscene language to her. She said, "What are you talking like that for? Don't you know this is your mama you're talking to? You don't talk to your mama that way." (R. 638)

The petitioner asked to talk to Michael. (R. 638) Michael got on the telephone and the investigator remained on the extension telephone in the

kitchen. The petitioner opened the conversation saying to Michael,

> "Boy, you ain't doing your part." Michael responded, "Ain't no boy here." He said, "man, you just covering your ass. Don't you know they can give us the chair for what we done? You ain't even doing your part, man. You ain't even put the gun where you was supposed to." And Michael said, "What gun, man? What gun? Dickey responded, "Nigger, you crazy, Nigger, you know what gun. You ain't even doing your part. I'm going to knock you man. You're just covering your ass. Michael then said, "I'll put it there now, man. I'll put the gun there now." Dickey said, "No, you won't man, f--- you. I'll get another gun. They ain't going to take me alive. I'll get another gun. I'll shoot it out with the police." (R. 639-640)

The telephone conversation between the petitioner and Michael ended. (R. 640) Officer Fleming advised Michael Gaines of his Miranda warnings. Officer Fleming had a conversation with Michael Gaines. (R. 512) Michael Gaines took Officer Fleming up to the second floor attic where he recovered a weapon. (R. 572) (People's Exhibits Nos. 14 and 15) Officer Fleming handed Investigator Dwyer the handgun which was wrapped in a bathtowel.

Subsequently, a murder warrant was issued for the petitioner. (R. 579) Pursuant to further investigation by police officers as to the probable whereabouts of the petitioner, the petitioner was arrested at 6:30 a.m. on January 2, 1979, by Chicago police officers, in the Continental Trailways Bus Terminal. (R. 583-584)

Investigator Dwyer was notified that the petitioner had been taken

into custody and that he was at the 5th District Police Station. He went there and arranged for a lineup. (R. 643) Lenious Thomas viewed the lineup and identified the petitioner. (R. 645-646)

Following the lineup he interviewed the petitioner around 2:00 p.m. He advised him of his Miranda warnings. (R. 647) He informed the petitioner that he had just been identified by an eyewitness as the individual who had shot and killed the victims, Mr. Davis and Mr. McCall. (R. 648) He also told him that his brother had implicated him as the shooter and had given the police the sequence of events. Investigator Dwyer also told the petitioner that the police had the murder weapon. (R. 648)

Investigator Dwyer told the petitioner that on December 23, he had been listening in on a telephone conversation in which the petitioner and his brother discussed "certain elements of this offense." (R. 653) The petitioner stated that "he knew that we had the phone tapped." (R. 654) The investigator corrected him and told him that the telephone had not been tapped but that he had received permission from his mother to listen in on the telephone conversation when he had the conversation with them. (R. 654) The petitioner said "that he knew that we were listening in somewhat." (R. 655)

Following petitioner's trial he was convicted of murder by the jury, and the same jury, after a bifurcated sentencing hearing imposed a sentence of death.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS SUPREME COURT HAS HELD THAT AN EXTENSION TELEPHONE IS NOT AN EAVESDROPPING DEVICE AND THEREFORE ANY OF PETITIONER'S CONVERSATIONS OVERHEARD BY THE POLICE ON AN EXTENSION TELEPHONE WERE NOT THE PRODUCT OF EAVESDROPPING AND COMPORT WITH THE FOURTH AMENDMENT.

The petitioner seeks the granting of a Writ of Certiorari by this Court, and claims that illegal eavesdropping occurred in contravention of the Fourth Amendment to the United States Constitution when petitioner's conversations were overheard by the police on a regularly placed extension telephone. (Pet. Cert. 16-25) The respondent submits that independent and adequate State grounds exist for the decision of the Illinois Supreme Court. The Illinois Supreme Court not only considered the merits of this issue but also has decided as a matter of State law that an extension telephone is not an eavesdropping device and therefore, any conversations overheard on the extension telephone comport with the Fourth Amendment.

Before addressing the question of whether or not a telephone extension was an eavesdropping device under Illinois law the Illinois Supreme Court examined whether the admission of the contents of those overheard conversations prejudiced the petitioner. The Court implicitly noted that while the petitioner did move pretrial to suppress these conversations, no record of that hearing was ever made part of the record on appeal.

The Illinois Supreme Court did have before it the testimony regarding the contents of the conversations overheard by Investigator Dwyer. The Court held that while the telephone conversations did include comments of the petitioner,

> which might amount to complicity, at the time of these conversations the police had already received information pointing to the defendant from interviews with the victim Thomas and with friends of the defendant whom the latter contacted following the crime. People v. Gaines, 88 Ill. 2d 342, 362 (1981).

Moreover, the petitioner did not object on the basis that his remarks were incriminatory but rather that the overhearing of his conversation with his brother Michael led to the recovery of the murder weapon. The Illinois Supreme Court held that such a contention was not supported by the evidence. The petitioner's brother Michael made statements during the telephone conversation regarding the location of the gun. Additionally, Officer Fleming testified that he had a face to face conversation with Michael Gaines after which Michael took the officer to the second floor of the house where Fleming recovered the gun. The Court also noted that other officers were present and they could have overheard Michael Gaines' remarks about the weapon.

Moreover, the petitioner abandoned on appeal any claim that the admission of the gun was error and he does not raise that issue in his petition for certiorari. Nor did petitioner argue on appeal that he was prejudiced by the ballistics evidence. The Illinois Supreme Court also noted that the petitioner did not contend that his conviction for murder was not proved beyond a reasonable doubt and he does not raise that issue in this Court.

In rejecting the petitioner's claim that his Fourth Amendment rights had been violated the Illinois Supreme Court recognized that the Illinois Eavesdropping Act regulates in the area of one party consent, an area not regulated by either the Illinois Constitution (People v. Richardson, 60 Ill. 2d 189 (1975) and People v. Kezerian, 77 Ill. 2d 121 (1979)), the United States Constitution (United States v. White, 401 U.S. 745 (1971))or Title III of The Omnibus Crime Control and Safe Streets Act 18 U.S.C.§ 2510 et. seq.

Moreover, contrary to petitioner's claim that the Illinois eavesdropping law "violates the ban against unreasonable searches and seizures found in either the Federal or the Illinois Constitution, that claim was carefully considered and was rejected in People v. Richardson (1975), 60 Ill. 2d 189. [cert. den. 423 U.S. 805.] See also People v. Kezerian (1979), 77 Ill. 2d 121, 127-128". People v. Gaines, 88 Ill. 2d 342, 364 (1981).

In its opinion the Illinois Supreme Court held that the monitoring of the petitioner's telephone conversations was not proscribed by Ill. Rev. Stat. 1977, ch. 38 § 14-2(a), because an extension telephone is not an eavesdropping device as defined in Ill. Rev. Stat. 1977, ch. 38 § 14-1(a). People v. Gaines, 88 Ill. 2d 342, 363 (1981). In holding that an extension telephone was not an eavesdropping device the Illinois Supreme Court noted that in the earlier decision of People v. Dixon, 22 Ill. 2d 513 (1961), it had so held with respect to the statutory antecedent of section 14-1(a),(Ill. Rev. Stat. 1959, ch. 38 par. 206.1). The Illinois Supreme Court then specifically held that its earlier holding in Dixon was applicable to the present section as well. Following the issuance of the opinion in the instant case, the Illinois Supreme Court again held that an extension telephone is not an eavesdropping device, under the Illinois statute. People v. Gervasi, ___ Ill. 2d ___ (Docket No. 54225 April, 16, 1982).

In Gervasi, the Court said that the Illinois statute, was "directed against the use of devices other than the telephone itself when the latter has not been functionally altered." (Op. Pet. Cert. Appendix A at 3)

The petitioner does not cite any authority for his argument that because some federal courts have found that extension telephones, in some instances, constitute eavesdropping devices, that Illinois law must follow suit. In any event, the Illinois eavesdropping statute is far more restrictive than the federal statute. Furthermore, all of the federal cases relied upon by the petitioner are totally distinguishable. Most of the cases do not involve an extension telephone and those that do, do not involve a regularly placed extension telephone which was the situation in the case at bar.

The petitioner raises the question of the consent of the parties to the overhearing of the telephone conversation. The Illinois Supreme Court in the instant case said that "the question of consent becomes material only if an eavesdropping device has been employed." People v. Gaines, 88 Ill. 2d 342, 363-364. Because an eavesdropping device has not been employed here, the question of consent is irrelevant. In any event it is undisputed that Mrs. Gaines consented to Officer Dwyer's presence on her extension telephone. It is also clear that Michael Gaines knew that the police officers were on the extension at the time Mrs. Gaines handed him the telephone receiver to talk to the petitioner. Michael, obviously aware that Officer Dwyer was listening on the telephone, tried to deny that he knew anything about the murder weapon. When, during his conversation with the petitioner, he denied knowing about the gun the petitioner said to him "you know what gun. You ain't even doing your part. I'm going to knock you, man. You're just covering your ass." (R. 639) Then Michael Gaines admitted to the petitioner that he would retrieve the

gun and put it where the petitioner wanted him to put it. When Michael Gaines finished the telephone conversation with the petitioner, he was given his Miranda warnings and after a conversation with Officer Fleming led the police to a second floor attic, where the gun was recovered. (R. 572, 640)

The People would reiterate that because no eavesdropping occurred, no Fourth Amendment rights of the petitioner were violated. In any event Mrs. Gaines' consent to the use of her telephone covered anyone using that telephone. Moreover, it is clear that Michael Gaines knew full well that Officer Dwyer was listening on the telephone and continued to talk and then had a face to face conversation with Officer Fleming. It is clear that the petitioner's Fourth Amendment rights were not violated and the evidence obtained from Michael Gaines after the telephone conversation was properly admissible.

For all of the above stated reasons, the respondent urges that because the Illinois Supreme Court properly decided this issue on the merits, because the decision of the Illinois Supreme Court is in accord with decisions of this Court, because the decision of the Illinois Supreme Court is founded on an independent and adequate State ground, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of Certiorari, such petition should be denied.

II.

THE TESTIMONY OF OFFICER DWYER CONCERNING THE STATEMENTS OF MICHAEL GAINES WAS CUMULATIVE OF OTHER UNCONTROVERTED, EYEWITNESS EVIDENCE OF THE MURDERS, PETITIONER WAS NOT THEREBY PREJUDICED AND THE AFFIRMANCE OF PETITIONER'S CONVICTION BY THE ILLINOIS SUPREME COURT IS WHOLLY CONSISTENT WITH THE HOLDINGS OF THIS COURT.

The petitioner claims that the introduction of the testimony of Investigator Robert Dwyer violated his Sixth Amendment right to confrontation, under Bruton v. United States, 391 U.S. 123 (1968), and therefore, his petition for a Writ of Certiorari should be granted. The respondent submits that the brief reference by Investigator Dwyer to statements made by petitioner's brother did not prejudice the defendant. Moreover, the holding of the Illinois Supreme Court that the petitioner was not prejudiced absolutely comports with numerous previous decisions of this Court.

At trial Investigator Dwyer testified that after the petitioner was arrested he had a conversation with him. The petitioner was first advised of his Miranda warnings and the petitioner said he would speak with him. Investigator Dwyer informed the petitioner that he had just been identified by "an eyewitness as the individual who had shot and killed Mr. Davis and Mr. McCall." The investigator "also told him that he had been implicated by his own brother, as the person who shot and killed these two--". At this point in the testimony defense counsel objected and moved for a mistrial. The court overruled the objection and denied the motion for a mistrial. (R. 648) The investigator then stated that he called to petitioner's attention the fact "that we did in fact have the murder weapon in custody and that his brother had given us an accounting of the whole sequence of events." (R. 648) Defense counsel

again objected and moved for a mistrial. The court overruled the objection but sustained it with regard to the conclusion "accounting" (R. 648), and denied the motion for a mistrial. (R. 649)

The investigator told the petitioner that on December 23rd he had been "listening in on a phone conversation that he [petitioner] had with his brother Michael in which he and Michael discussed certain elements of the offense." (R. 653) The investigator testified that petitioner, after being told that the officer had been listening in, stated,

> ...that he knew that we had the phone tapped. I went on to correct his statement that the phone hadn't in fact been tapped, but that I had received permission from his mother to listen in on the extension phone and that I was in his home, his mother's home listening in on the extension when he had the conversation with his mother and Michael. (R. 654)

After the investigator told petitioner what he had been doing during the telephone calls the petitioner "said that he knew it was something like that." (R. 654) "He knew we were listening in somewhat." (R. 655) The petitioner's objection was not renewed at this point and he did not cross-examine Investigator Dwyer.

The second statement discussed immediately above as well as the first statement complained of, "---I also told him that he had been implicated by his own brother as the person who shot and killed these two---," were cumulative of the testimony given by the investigator immediately preceding that statement. Before either of these two complained of statements was made, in the preceding, unobjected to testimony, the investigator said that he "informed him that he had just been identified by an eyewitness as the individual who had

shot and killed Mr. Davis and Mr. McCall." (R. 648) It is clear therefore that at the time Investigator Dwyer volunteered that Michael Gaines made a statement, the jury already knew that an eyewitness to the killing had made the same statement. Moreover, at this point in the trial the jury had already heard Lenious Thomas' eyewitness testimony. The jury was well aware that the petitioner and his brother had robbed Lenious Thomas, had shot and killed the sleeping Causia McCall, and had shot Andre Davis in the back, killing him as well. The jury was also aware, having heard Lenious Thomas testify, the when the shooting started he fell to the floor and lay there while the petitioner sprayed the room with bullets. Nothing in the investigator's testimony could have prejudiced the defendant.

The Illinois Supreme Court held that it "need not decide whether the admission of ...Dwyer's testimony violated the Bruton rule, however, since the uncontroverted eyewitness testimony of Thomas was sufficient to sustain the defendant's conviction of murder, and the admission of Dwyer's testimony would be harmless error." People v. Gaines, 88 Ill. 2d 342, 366. In support of its holding the Illinois Supreme Court cited three decisions of this Court, Brown v. United States, 411 U.S. 223 (1973), Schneble v. Florida, 405 U.S. 427 (1972) and Harrington v. California, 395 U.S. 250 (1969).

In Brown v. United States, 411 U.S. 230 (1973), this Court held that testimony erroneously admitted in violation of Bruton was cumulative of other overwhelming and uncontroverted evidence which was properly before the jury. Citing the axiom that a defendant is entitled to a fair trial but not a perfect one, this Court rejected the notion that a Bruton error can never be harmless.

In Harrington v. California, 395 U.S. 250 (1969), the defendant was tried jointly with three others. He admitted being at the scene but denied any complicity in the crime. He was implicated by all three co-defendants and one

of those men testified and implicated him. Harrington claimed that this testimony violated Bruton and that his conviction should be reversed. This Court held that apart from the co-defendant's statements the evidence against Harrington was overwhelming and that any violation of Bruton was harmless beyond a reasonable doubt. (See also Schneble v. Florida, 405 U.S. 427 (1972), a capital murder case in which a Bruton violation was held to be harmless error).

In the instant case Investigator Dwyer's testimony contained only one volunteered, isolated remark about the substance of the severed co-defendant's statement. In Brown v. United States, supra, this Court held a Bruton error to be harmless where the co-defendant's statement, which was testified to by an F.B.I. agent and which implicated the petitioner, was lengthy and very detailed. In Harrington v. California, supra, the one testifying co-defendant placed the defendant at the scene of the robbery with a gun. The two non-testifying co-defendant's confessions placed the defendant at the scene of the robbery. Despite these three statements the Court held the Bruton error to be harmless. Clearly, if this Court held that despite the detailed statements which were admitted in violation of Bruton in both Harrington and Brown, the harmless error rule should govern, then such must be the situation in the instant case, where the passing reference by Investigator Dwyer to Michael Gaines' statement was cumulative of the testimony he had just given as well as cumulative of the testimony of Lenious Thomas. It is clear, therefore, that if any error occurred it was harmless.

For all of the above stated reasons, the respondent urges that because the Illinois Supreme Court properly decided this case on the merits, found that the evidence of guilt was overwhelming, because the decision of the

Illinois Supreme Court is in accord with decisions of this Court and because the petitioner has failed to show any need for this Court to grant his petition for a writ of certiorari, such petition should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Appendix

Docket No. 54225—Agenda 9—September 1981.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. JOHN GERVASI *et al.*, Appellees.

CHIEF JUSTICE RYAN delivered the opinion of the court:

The defendants, John Gervasi and Michael Ettinger, were charged in a nine-count indictment with bribery, solicitation, and conspiracy in the circuit court of Cook County. At a hearing on a motion to suppress evidence, it was stipulated that telephone conversations between the defendants and police officers were overheard by court reporters who were listening on extension telephones from which the speaking element had been removed. Also, other conversations were overheard by investigators and court reporters without any listening devices. All the conversations were taken down by the court reporters using a stenograph machine. The trial court, on defendants' motion, suppressed all transcripts of and testimony relating to the conversations. The appellate court affirmed in part and remanded for a hearing on whether the testimony and transcripts of the in-person conversations should have been suppressed. (90 Ill. App. 3d 1117.) We granted the State leave to appeal. 73 Ill. 2d R. 315.

Charles Soteras, while driving a stolen automobile, was arrested by Blue Island police officer Daniel Furay and Sergeant Paul Barnes. Defendant Gervasi, an attorney, was called to the police station to represent Soteras.

Gervasi told Furay that he would contact him later. Several days later, Furay received a business card from defendant Gervasi with the following words written on the back: "Danny, Going out of town Saturday, Sunday, Monday. Will return Tuesday afternoon. Could you please call. I would like to talk to you." Furay, believing that he would be offered money to help Soteras in his pending criminal case, contacted the Cook County State's Attorney's office. A plan was devised to monitor the conversations between defendant Gervasi and Furay.

During the next two months, Gervasi called Furay at his home 20 times. A court reporter, employed by the State's Attorney's office, was present and listened to all of the conversations on an extension telephone in the Furay home. The telephone was a regular telephone that had been in the home for several years. On each occasion, the reporter removed the speaking element in the mouthpiece of the telephone, listened to the conversation and

transcribed it with "the same type of manually operated machine used by most court reporters in the courtroom." On three occasions Furay called Gervasi. One call was made from Furay's home and the other two were made from the State's Attorney's office. These conversations were monitored by court reporters on extension phones which had been similarly altered.

Gervasi also visited Furay at his home on four occasions. On two occasions, a court reporter was located so that he could overhear the conversation, which he recorded by use of a stenograph machine.

Officer Furay had six telephone conversations with defendant Ettinger, also an attorney. The same technique as described above was used to record the conversations with defendant Ettinger.

There were three telephone conversations between defendant Gervasi and an assistant State's Attorney. Also, one telephone conversation took place between Gervasi and Sergeant Barnes. These conversations were monitored and recorded using the same technique described above.

The trial court held that an eavesdropping device as defined in section 14–1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 14–1) had been used to transcribe the telephone conversations and that the State's Attorney's office had not received judicial approval as provided in section 108A–1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 108A–1). The trial court entered an order suppressing the court reporters' transcripts of both the telephone and in-person conversations between the defendants and investigators. Also, the court suppressed the prospective testimony of the court reporters and the police officers regarding all conversations with the defendants. The appellate court affirmed but remanded with directions to conduct a hearing to determine whether the testimony of Officer Furay and the court reporters "regarding the in-person conversations and the transcripts of these conversations were the fruit of the poisonous tree."

The State argues that no eavesdropping device was used in this instance and that, therefore, no judicial authorization was required. Secondly, the State argues that, even if there was an eavesdropping device in use, the testimony of Office Furay was not tainted in any way and, therefore, should not be suppressed.

We first consider whether an extension telephone with the speaking element removed from the mouthpiece is an eavesdropping device as defined in section 14–1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 14–1(a)), which states that an eavesdropping device is "any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means." (Ill. Rev. Stat. 1977, ch. 38, par. 14–1(a).) In *People v. Gaines* (1981), 88 Ill. 2d 342, we held that an extension telephone was not an eavesdropping device within the statutory definition. In *Gaines* we reaffirmed this court's holding in *People v. Dixon* (1961), 22 Ill. 2d 513, which was decided under the 1959 eavesdropping statute and applied the holding in *Dixon* to the current definition of an eavesdropping device in section 14–1(a) of the Criminal Code of 1961. We stated in *Gaines* that the basis of the *Dixon* decision must have been "that the statute is directed against the use of devices other than the telephone itself when the latter has not been functionally altered." (*People v. Gaines* (1981), 88 Ill. 2d 342, 363.) An extension telephone by itself, therefore, is not an eavesdropping device. However, if it has been "functionally altered" in some manner so that it is no longer capable of performing its customary function it is no longer a telephone.

The function of a telephone is to transmit and receive sound. A telephone which is altered so that it can no longer perform one of these functions, namely the transmission of sound, is not a telephone but only a listening device. The removal of the transmitter or speaking element from the mouthpiece of each of the telephones made them eavesdropping devices within the meaning of our statute.

We next consider the effect of the illegal monitoring of these telephone conversations. Since one party to the conversations had consented to the monitoring, neither the Federal Constitution, nor the constitution of this State was offended. (*People v. Kezerian* (1979), 77 Ill. 2d 121; *People v. Richardson* (1975), 60 Ill. 2d 189.) However, section 14–5 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 14–5) provides:

> "Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial ***."

Also, article 108A of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 108A–1 *et seq.*)

provides for judicial supervision of the use of eavesdropping devices and states:

> "(a) Any aggrieved person in any judicial or administrative proceeding may move to suppress the contents of any recorded conversation or evidence derived therefrom ***." (Ill. Rev. Stat. 1977, ch. 38, par. 108A–9.)

By virtue of these two statutory provisions, the trial court properly suppressed the testimony of the court reporters as to the telephone conversations and the transcripts of what they heard by use of the altered extension telephones.

The appellate court held that the prospective testimony of Officer Furay, Sergeant Barnes and Assistant State's Attorney Burnham, participants in the various conversations, was "fruit of the poisonous tree" and should be suppressed. (*Wong Sun v. United States* (1963), 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407.) The State argues that the "fruit of the poisonous tree" doctrine does not apply in this instance since the knowledge of the investigators was not derived from an unlawful act and that an independent basis exists for the investigators' knowledge of the contents of the conversations.

The test of whether evidence is "fruit of the poisonous tree" is best stated in *Wong Sun v. United States* (1963), 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455, 83 S. Ct. 407, 417, as follows:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

In *People v. Maslowsky* (1966), 34 Ill. 2d 456, we held that the "fruit of the poisonous tree" doctrine was expressly included in our eavesdropping statute by the legislature.

However, the doctrine does not apply in this case. The testimony of the investigators regarding the conversations would not even come within the broader "but for" test rejected by the Supreme Court in *Wong Sun*. The basic assumption underlying the "fruit of the poisonous tree" doctrine is that the challenged evidence is *derived* from

some violation of a statutory or constitutional right. In *United States v. Crews* (1980), 445 U.S. 463, 470, 63 L. Ed. 2d 537, 545, 100 S. Ct. 1244, 1249, the Supreme Court stated:

> "*Wong Sun, supra,* articulated the guiding principle for determining whether evidence *derivatively* obtained from a violation of the Fourth Amendment is admissible against the accused ***." (Emphasis added.)

The court went on to state:

> "In the typical 'fruit of the poisonous tree' case, however, the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation, and the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality. Thus most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity." (*United States v. Crews* (1980), 445 U.S. 463, 471, 63 L. Ed. 2d 537, 545, 100 S. Ct. 1244, 1249-50.)

See also *Lopez v. United States* (1963), 373 U.S. 427, 10 L. Ed. 2d 462, 83 S. Ct. 1381.

This doctrine cannot apply where, as here, the investigators' knowledge was not derived from the court reporters' eavesdropping activities. In this case, there is no primary illegality in regard to the investigators' knowledge of the content of the conversations.

The defendants rely on *People v. Satek* (1979), 78 Ill. App. 3d 543, to support their position that the testimony of the officers should be suppressed. In *Satek* a suspect, James Poghen, Jr., placed a phone call from the police station which was recorded. After having been told that the call had been recorded, Poghen admitted his involvement in the offense and implicated the defendant in that case, James Satek. The trial court suppressed Poghen's testimony at Satek's trial because of a violation of the eavesdropping statute. The court held that although Poghen had first-hand knowledge of the offense independent of the recording, his testimony should be suppressed except as to those events occurring after he had been approached by the police until the time that he made the

telephone call. The appellate court held that the trial court could have concluded that Poghen's testimony was not obtained by a means subsequently distinguishable from the illegality so as to be purged of the taint. The trial court could have considered that Poghen's conversation and statement implicating Satek occurred immediately after he was told that the phone call had been recorded. The gist of the holding in *Satek* is that the information concerning Satek's involvement had been induced by or come by as a result of the illegal eavesdropping. The holding in *Satek* is not helpful under the facts of our case. The officers' knowledge of and his testimony concerning the contents of the phone conversations in our case were completely independent of the illegal eavesdropping. Therefore, there is no indication that the testimony of these officers was in any way induced or influenced by the eavesdropping. Here the officers were the actual participants in the conversations. Their knowledge of what was said was not derived from any illegal action. They spoke directly with the defendants, and most of the conversations were initiated by the defendants and none of them were the result of illegal eavesdropping. The officers were the participants in the conversations and were not the eavesdroppers.

In *People v. Porcelli* (1974), 25 Ill. App. 3d 145, an assistant State's Attorney tape-recorded a telephone conversation between a policeman and a lawyer. The lawyer offered money to a policeman if he would change a police report in reference to a client of the defendant lawyer. The lawyer was indicted for bribery. The tape recording was suppressed by the trial court because the authorization by the State's Attorney did not meet the standards required by Illinois law. The appellate court affirmed the suppression of the tape recording but held that the policeman should be permitted to testify to what was said. The court stated:

> "[T]he transcribing did not render inadmissible all testimony concerning the conversation or the evidence which was not directly derived from it." (*People v. Porcelli* (1974), 25 Ill. App. 3d 145, 150.)

The court also pointed out that the conversation was motivated independently of the eavesdropping and that there was no connection between the conversation and the eavesdropping. As in the instant case, the policeman in

Porcelli was a participant in the conversation and his knowledge of what was said was not derived from the illegal recording. (See *People v. Mosley* (1978), 63 Ill. App. 3d 437.) In our case, as in *Porcelli*, the defendant knew that he was dealing with police officers. The eavesdropping statute does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides will not thereafter properly reveal his wrongdoing. The officers did not surreptitiously obtain information from the defendants. In *United States v. White* (1971), 401 U.S. 745, 751, 28 L. Ed. 2d 453, 458, 91 S. Ct. 1122, 1125-26, the Supreme Court stated:

> "Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights."

We conclude that the testimony of the officers as to the telephone conversations should not have been suppressed.

The final issue is whether the testimony and transcripts of the in-person conversations between defendant Gervasi and Officer Furay should be suppressed. There were four in-person conversations, two of which were overheard by Sergeant Barnes and an investigator for the State's Attorney's office, and the other two conversations were overheard by a court reporter who recorded them on a stenograph machine. The in-person conversations were overheard without the aid of any eavesdropping devices.

The appellate court remanded this issue to the trial court with directions to hold a hearing to determine whether the testimony and transcripts of those conversations "were the fruit of the poisonous tree." The trial court held that there is a logical inference that the information obtained from the illegal eavesdropping was relied on by the State in arranging to have persons in the Furay residence to overhear the in-person conversations. The appellate court, however, held that the trial court, without having read the transcripts of the eavesdropping, could not have determined that the conversations were the fruit of the poisonous tree and thus remanded for a hearing on this issue. As we have noted, Officer Furay was a participant in the conversations. The transcripts of the telephone conversations could contain no information to which

Officer Furay could not testify.

The defendant has not demonstrated, except by conjecture, that the monitoring of the in-person conversations was in any way the result of the illegal eavesdropping. In *People v. Wilson* (1975), 60 Ill. 2d 235, 238, this court stated:

> "If an accused establishes the 'primary illegality' and shows a connection between the illegality and what are alleged to be the fruits of the illegality, the prosecution will have the burden of establishing by clear and convincing evidence that the challenged evidence has come from an independent source."

In our case the defendant has not met the burden of showing a connection between the illegal eavesdropping and the subsequent in-person conversations between the defendant Gervasi and Officer Furay. Thus, the burden of establishing that the challenged evidence has come from an independent source has not shifted to the State. It is more logical to assume that these meetings were the result of Officer Furay's activities and the information obtained from him than it is to assume, as the trial court did, that they stemmed from the illegal eavesdropping. In *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, 392, 64 L. Ed. 319, 321, 40 S. Ct. 182, 183, the court stated that "[i]f knowledge of them [corporate records] is gained from an independent source they may be proved like any others." Officer Furay is an independent source of all information overheard by investigators or court reporters, and the overheard conversations "may be proved like any others."

In sum, we hold that an extension telephone with the speaking element in the mouthpiece removed is functionally altered and was, therefore, not a telephone but an eavesdropping device. The court reporters' testimony as to what they overheard was properly suppressed. Also, transcripts of the telephone conversations made by the court reporters were properly suppressed. The testimony of Officer Furay, Sergeant Barnes and Assistant State's Attorney Burnham regarding their telephone conversations with the defendants should not have been suppressed. Likewise, the testimony by the investigators and court reporters regarding the in-person conversations between defendant Gervasi and Officer Furay and the transcripts of those conversations should not have been suppressed.

Accordingly, the appellate court is affirmed insofar as it affirmed the suppression of the testimony of the court reporters and their transcripts concerning the monitored telephone conversations. The appellate court is reversed as to its order vacating the circuit court's suppression of the testimony of the participants in the conversations and the transcripts of the in-person conversations. The appellate court is also reversed as to its order remanding for further hearing the question of the suppression of the testimony and the transcripts of the overheard in-person conversations. The cause is remanded to the circuit court of Cook County for further proceedings.

Appellate court affirmed in part and reversed in part; cause remanded.

JUSTICE CLARK, specially concurring:

I concur with the result reached by the majority. I adhere to the statements made in my dissent in *People v. Gaines* (1981), 88 Ill. 2d 342, that when an extension telephone is used to surreptitiously overhear the conversation of two people, then it becomes an eavesdropping device although one party may have consented. It is the use to which the extension telephone is put that makes it illegal. I believe that to hold otherwise ignores the plain meaning of the statutory language that an "eavesdropping device" as defined by section 14—1(a) of the Criminal Code of 1961 is "*** *any* device *capable of* being used to hear or record oral conversation whether such conversation is conducted in person, *by telephone,* or by any other means ***." (Emphasis added.) Ill. Rev. Stat. 1977, ch. 38, par. 14—1(a).

The majority, in my opinion, correctly concludes that the "functionally altered" extension telephone is an eavesdropping device as defined in section 14—1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 14—1(a)), and evidence obtained through its use is properly suppressed.

I also agree with the majority that the appellate court erred in determining that the testimony and transcripts

of the in-person conversations between the defendant and Officer Furay should have been suppressed, since the State adequately demonstrated that the evidence came from "an independent source." I do, however, disagree with the majority insofar as the court addresses the defendant's *burden* of demonstrating a connection between the illegal eavesdropping and the subsequent in-person conversations. It is true that the defendant must show a connection between the illegality and the alleged fruits of that illegality. (*Cf. Harrison v. United States* (1968), 392 U.S. 219, 20 L. Ed. 2d 1047, 88 S. Ct. 2008.) But the defendant does not shoulder a "burden" of establishing that connection by clear and convincing evidence. It is the State that, following the showing of the primary illegality and the connection to the evidence in question, must carry the burden of demonstrating by clear and convincing evidence that the source of the information is an independent one. *People v. Wilson* (1975), 60 Ill. 2d 235, 238; *Harrison v. United States* (1968), 392 U.S. 219, 20 L. Ed. 2d 1047, 88 S. Ct. 2008.

The majority notes that in determining whether evidence is admissible the inquiry properly focuses on whether the "taint" of the original illegality has been removed. " '*** Thus most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity.' " (Slip op. at 7, quoting *United States v. Crews* (1980), 445 U.S. 463, 471, 63 L. Ed. 2d 537, 545, 100 S. Ct. 1244, 1249-50.) However, the State met its burden of showing that, since Officer Furay was a participant in the phone conversations, he did not have to rely on the transcripts gained through the illegal eavesdropping. As such the State established independent grounds that removed the "taint" from the in-person conversations and the transcripts of those conversations. That evidence should not have been suppressed.

JUSTICE WARD, concurring in part and dissenting in part:

For reasons to be stated in more detail shortly, I dissent from the holding that the use of the telephones here constituted eavesdropping under our statute.

IN THE SUPREME COURT
OF THE UNITED STATES

DICKIE GAINES, Petitioner,	)	
vs.	)	No. 81-6323
STATE OF ILLINOIS, Respondent	)	

OBJECTION TO PETITIONER'S MOTION
TO DETERMINE HIS COMPETENCY TO
WITHDRAW HIS PETITION FOR A WRIT
OF CERTIORARI.

NOW COME the People of the State of Illinois, Respondent, by their Attorney, RICHARD M. DALEY, State's Attorney of Cook County, Illinois, through his Assistant, JOAN S. CHERRY, and object to petitioner's motion to order a hearing to determine petitioner's competency to withdraw his petition for certiorari. In support of the objection respondent states as follows:

1. That the petitioner was convicted of murder and armed robbery and sentenced to death;

2. That the petitioner's convictions and death sentence were affirmed by The Illinois Supreme Court and rehearing was denied. People v. Gaines, 88 Ill. 2d 342 (1982);

3. That the attorneys who represented petitioner in the Illinois Supreme

Court were discharged by him and he filed a pro se petition for a writ of certiorari;

4. That Ira Moltz, was appointed as counsel for petitioner by the Illinois Supreme Court after petitioner's attorneys were discharged, "for the purpose of consultation with the defendant should he request it". (See Exhibit A) In its order the Illinois Supreme Court ordered that "Ira Moltz is hereby appointed as counsel to assist defendant in his appeal to The Supreme Court of the United States should defendant request his assistance and for the further purposes indicated above." (See Exhibit A)

5. That on April 15, 1982, the petitioner, pro se, moved to dismiss his petition for certorari in this Court;

6. That on April 15, 1982, the petitioner pro se, filed with the Illinois Supreme Court a waiver of his right to file a petition for certiorari and demanded to have his sentence carried out;

7. In his waiver petitioner demanded that The Illinois Supreme Court reject any "amicus brief or motion, or petition filed by any other attorney, organization, etc. to prevent his execution from being carried out." He then swore to this statement in his affidavit;

8. Petitioner stated in his waiver that the waiver was made knowingly, voluntarily and intelligently;

9. Petitioner stated in his pro se motion to dismiss his petition for certiorari, that his decision to waive all appellate proceedings was made knowingly, intelligently and voluntarily;

10. That Attorney Moltz has filed this motion asking this court to order a hearing to determine petitioner's competency to withdraw his petition for a writ of certiorari;

11. That Attorney Moltz's motion nowhere contains an indication or statement that petitioner desired that he file this motion on petitioner's behalf;

12. Therefore, it is unclear exactly what standing Attorney Moltz has to make this motion to order a competency hearing on petitioner's behalf. If Attorney Moltz purports to act as "next friend" to the petitioner, the respondent submits that such a concept is wholly inapplicable to this case, where petitioner has requested that his sentence be carried out and he has not requested the help of Attorney Moltz. Gilmore v. State of Utah, 429 U.S. 1012, reh. den. 429 U.S. 1030 (1976);

13. Should this Court even consider this motion the respondent states that at no point in any of the proceedings in this case was petitioner's sanity or competence ever raised as an issue nor has a psychiatric evaluation ever been requested or provided;

14. That the instant situation is distinguishable from Rees v. Payton, 384 U.S. 312 (1966), wherein this Court remanded the issue of the petitioner's competence to the District Court. In Rees the petitioner had been examined by a psychiatrist at the time he sought to withdraw his petition and the psychiatrist said he was insane. As previously noted in Allegation 13, the petitioner's competence or sanity has never been an issue in this case.

15. That petitioner states repeatedly that his waiver of his right to appeal is made knowingly, voluntarily and intelligently;

16. That there is no statutory provision in the Illinois Criminal Code for a hearing to determine a person's competency to waive appellate rights;

17. That assuming this Court considers petitioner's request, the People submit that a determination of petitioner's competence to waive his appellate rights is purely a matter for the State Court (the Circuit Court of Cook County), not this Court to determine;

18 Attorney Moltz's request that the case be remanded to The United States District Court for the Southern District of Illinois is wholly inappropriate because to your movant's knowledge no action involving the petitioner is pending there nor has there ever been an action involving the petitioner pending there with respect to the instant case.

WHEREFORE, the respondent, People of the State of Illinois respectfully request that Petitioner's Motion for a competency hearing be denied.

Respectfully submitted,

RICHARD M. DALEY
State's Attorney of Cook County

By:_____
Joan S. Cherry
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602

Attorney for Respondent

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

A F F I D A V I T

JOAN S. CHERRY, being first duly sworn on oath, deposes and says that your affiant is a duly appointed and acting Assistant State's Attorney of Cook County, Illinois, that your affiant has read the foregoing Objections by her subscribed; that your affiant knows the contents therein, and that the same is true in substance and in fact.

Assistant State's Attorney

SUBSCRIBED AND SWORN TO
before me this 28th day
of A.D., 1982.

Notary Public

No. 52794 - People State of Illinois, appellee, vs. Dickey
Adv. 92 Gaines, appellant.

The portion of the motion by appellant, pro se, that he be furnished a copy of the transcript of oral argument on March 11, 1981, is denied. That part of the motion by appellant, pro se, that he be furnished a copy of all docket entries in this case is allowed.

The defendant in the captioned case has discharged and has persisted in rejecting the services of appointed counsel. Defendant furthermore insists on preparing and filing without counsel a pro se petition for writ of certiorari to the Supreme Court of the United States. However, this court deems it necessary to appoint counsel for the purpose of consultation with the defendant should he request it. Appointed counsel should also be available for presentation of matters should the Supreme Court of the United States desire clarification of issues or questions which defendant may seek to present to that Court. It is therefore, ordered that Ira Moltz is hereby appointed as counsel to assist defendant in his appeal to the Supreme Court of the United States should defendant request his assistance and for the further purposes indicated above.

EXHIBIT "A"

NO. 81-6323

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

NOTICE OF FILING

PLEASE TAKE NOTICE that on the 28th day of April, 1982, I filed with the Clerk of the Supreme Court of the United States the Brief For Respondents in Opposition to Certiorari and Respondent's Objection to Petitioner's Motion for a Competency Hearing.

Dickie Gaines
C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois, 62259

Ira Moltz
20 N. Clark St.
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Chicago, Illinois 60602

Tyrone Fahner
Attorney General,
State of Illinois
Suite 2200
Chicago, Illinois 60601

By: _____
Assistant State's Attorney
500 Chicago Civic Center
Chicago, Illinois 60602
443-5496

SUBSCRIBED AND SWORN TO
before me this 28th day of
April, 1982.

_____
Notary Public

NO. 81-6323

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DICKIE GAINES,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and says that in compliance with Supreme Court Rule 28.2, .3, & .5(b) she served 1 copy of the Brief For Respondents in Opposition and Respondent's Objection to Petitioner's Motion for a Competency Hearing, in the above entitled cause by depositing the same in the United States Mail at Chicago, on the 28th of April, 1982, properly stamped and addressed to:

Dickie Gaines
C-71796
Menard Correctional Center
Lock Box 711
Menard, Illinois 62259

Ira Moltz
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Tyrone Fahner
Attorney General,
State of Illinois
188 W. Randolph St.
Suite 2200
Chicago, Illinois 60601

Joan S. Cherry

Assistant State's Attorney.

SUBSCRIBED AND SWORN TO
before me this 28th day of
April, 1982.

Notary Public